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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 341. 89.

MARGARET A. MUSE, HIPPOLITE FILHIOL, FRANCIS J. WATTS, ET AL., PLAINTIFFS IN ERROR,

vs.

THE ARLINGTON HOTEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 24, 1895.

(16,031.)

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(16,031.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 22, 1897.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Margaret A. Muse, Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bress, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hiplite Bres, Alberta D. Sanford, by her mother and next friend, Mary A. Dempsey; Frank C. Bres, Ferdinan A. Fenner, Blanche F. Power, Robert W. Fenner, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Charles C. Sanford, and Alice F. South, heirs-at-law of Don Juan Filhiol, plaintiffs, and The Arlington Hotel Company, the defendant, a manifest error hath happened, to the great damage of the said Margaret A. Muse, Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bress, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hiplite Bres, Alberta D. Sanford, by her mother and next friend, Mary A. Dempsey; Frank C. Bres, Ferdinan A. Fenner, Blanche F. Power, Robert W. Fenner, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Charles C. Sanford, and Alice F. South, heirs-at-law of Don Juan Filhiol, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

The Seal of the Circuit Court, U. S. A., Western Division of East. Dist. Ark.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Western Division, Eastern District of Arkansas.

Allowed by—
JNO. A. WILLNER,
U. S. Dist. Judge.

1—341

The execution of the foregoing writ of error appears from the transcript herewith.

RALPH L. GOODRICH, *Clerk.*

2 Be it remembered that on the 25th day of July, 1894, came into the office of the clerk of the circuit court of the United States in and for the western division of the eastern district of Arkansas Margaret A. Muse *et al.*, by E. W. Rector, Esqr., their attorney, and filed therein a complaint against the Arlington Hotel Company; which complaint is in the words and figures following, to wit:

3 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

MARGARET A. MUSE, HIPPOLITE FILHIOL, FRANCIS J. WATTS, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hipolite Bres, Alberta D. Sanford, by Her Mother and Next Friend, Mary A. Dempsey; Frank C. Bres, Ferdinan A. Fenner, Blanche F. Power, Robert W. Fenner, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Charles C. Sanford, and Alice F. South, Heirs-at-law of Don Juan Filhiol,

vs.

ARLINGTON HOTEL COMPANY.

Complaint at Law.

The plaintiffs state that the- bring this suit against said defendant, The Arlington Hotel Company, a corporation organized under the laws of Arkansas and doing business at Hot Springs, in said State, and for cause of action say they are all non-residents of the State of Arkansas, and that all of them are citizens and residents of the United States of America except the plaintiff Alice F. South, who is a citizen and resident of the State of Coahuila, Mexico; that of said plaintiffs Margaret A. Muse, Hypolite Filhiol, Francis J. Watts, Har-iet L. Watkins, Roland M. Filhiol, Jerome Bres, Benedett H. Bres, Hattie S. Burch, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hypolite Bres, and Alberta D. Sanford, a minor, are citizens and residents of the State of Louisiana; Frank C. Bres, Blanche F. Power, Robert W. Fenner, and Ferdinand A. Fenner are citizens and residents of the State of Texas;

4 Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford are citizens and residents of the State of Mississippi, and Mary A. Bres is a citizen and resident of the State of Illinois; that the- are the only heirs-at-law of Don Juan Filhiol, who died a citizen of the Territory of Louisiana in the year 1821; that they are owners in fee-simple of the following-described tract of land lying in the county of Garland, in the State of Arkansas, to wit: A certain one square league of land, with the hot springs, at the city

of Hot Springs, in said county and State, as the center of said league of land; that they claim title to said league of land as said heirs-at-law of the said Don Juan Filhiol, as follows:

First. On December the 12th, 1787, Don Juan Filhiol, Spanish commandant of the Ouachita, memor-alized the governor of the province- of Louisiana and West Florida for a grant of land, whereon the governor ordered a survey to be made, and on February 22nd, 1788, a grant for said land was executed and delivered by said governor to said Don Juan Filhiol, as will appear by reference to said grant, a translation of which is filed herewith, marked Exhibit "A," and made part hereof.

Second. On December the 6th, 1788, under the order of said governor of said province- of Louisiana and West Florida, the surveyor of said province- executed and delivered to said Don Juan Filhiol a certificate of survey of said land, as will appear by reference to said certificate of said survey, a translation of which is herewith filed, marked Exhibit "B," and made part hereof.

Third. On November the 25th, 1803, the said Don Juan Filhiol sold and conveyed said land by deed to his son-in-law, Narcisso Bourgeat, as will appear by reference to said deed, a translation of which is herewith filed, marked Exhibit "C," and made part hereof.

Fourth. On the 17th of July, 1806, the said Narcisso Bourgeat executed and delivered to the said Don Juan Filhiol a deed reconveying to him, the said Don Juan Filhiol, said land, as will appear by said deed, a translation of which is herewith filed, marked Exhibit "D," and made part hereof.

Said defendant is in the unlawful possession of a certain portion of said league of land, which portion is included in the Hot Spring Mountain reservation, in the city of Hot Springs, county of Garland, and State of Arkansas, the boundary lines of which reservation were established by the Hot Springs commission by public surveys in pursuance of the laws of the United States, said land so unlawfully possessed by said defendant being more particularly described as follows, to wit: Commencing at the quarter-section corner between sections thirty-two and thirty-three, in township two south, range nineteen west of the fifth principal meridian, in the city of Hot Springs, county of Garland, and State of Arkansas, and run thence north seventy-seven degrees and thirty minutes east four hundred and thirty-seven feet to a stone monument known as angle No. 33 of said Hot Spring Mountain reservation; thence along the line of said reservation, between angles thirty-three and thirty-four thereof, fifteen feet to the point of beginning; thence south five degrees east three hundred and twenty-two feet; thence north eighty-five degrees east seventy-six feet; thence north five degrees west ninety-nine and eight-tenths feet; thence north eighty-five degrees east sixty feet; thence north five degrees west fifty-seven feet; thence south eighty-five degrees west seventy-six feet; thence north five degrees west fifteen and eight-tenths feet; thence north eighty-five degrees east twenty-nine feet; thence north five

degrees west eighty-seven and eight-tenths feet; thence south
6 eighty-five degrees west thirty feet; thence north five degrees west twenty feet; thence north eighty-five degrees east one hundred and seventy-four and seven-tenths feet; thence north five degrees west fifty-three feet; thence south eighty-five degrees west forty-eight feet; thence north five degrees west eighty feet; thence north eighty-five degrees east fifty-four feet; thence north five degrees west one hundred feet to a point between angles numbering thirty-three and thirty-four of said Hot Spring Mountain reservation three hundred and twenty-none and seven-tenths feet from said angle number thirty-three; thence along said reservation line southwestward one hundred and thirty-eight and seven-tenths feet; thence south five degrees east one hundred and six feet; thence one hundred and thirty feet south eighty-five degrees west to the point of beginning, all courses being magnetic.

Said defendant has been in the unlawful possession of said portion of said land so particularly described as aforesaid since the third day of March, 1892, during all of which time the said plaintiffs have had title to said land, and still have, and the right to the possession thereof; and plaintiffs say that by reason of the said wrongful possession of said land by said defendant they have sustained damage in the sum of twenty thousand dollars. Wherefore they pray judgment for the recovery of said land so unlawfully held by said defendant and for the possession thereof and for said damages for the unlawful detention of the same.

E. W. RECTOR,
Attorney for Plaint-ffs.

STATE OF ARKANSAS, }
County of Garland. }

E. W. Rector says he is the attorney for the plaintiffs in this action, who are absent from the State of Arkansas, and that
7 he believes the statements contained in said complaint are true.

E. W. RECTOR.

Subscribed and sworn to befor- — this 23rd day of July, 1894.
[SEAL.] J. P. MELLARD,
Notary Public.

My commission expires December 11, 1894.

EXHIBIT A.

From the land archives.

The governor and intendent of the provinces of Louisiana and Florida West and inspector of troops, etc.:

Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of this post of Ouachita, of a tract of land of one square league, situated in the district of Arcansas on

the north side of River Ouachita, at about two leagues and a half distance from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve those surveys, using the faculty which the King has vested in us, and assign in his royal name unto the said John Filhiol the said league of land in order that he may dispose of the same and of the usufruct thereof as his own.

We give these presents under our own hand, sealed with the seal of our arms and attested by the undersigned secretary of His Majesty in this government and intendence.

8 In New Orleans on the 22nd of February, 1788.

(Signed) ESTEVEN MIRO.

By mandate of His Excellency:

(Signed) ANDRES LOPEZ ARMESTO.

Registered. 14262.

EXHIBIT B.

Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estavan Miro, brigadier of the R. ex. gov., intendent of the province- of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situation on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies, in conformity with — of the 6th of present month of December and of the current year 1788.

(Signed) CARLOS TRUDEAU.

9 EXHIBIT "C."

Know all men by these presents, that I, John Filhiol, captain and commandant of the militia of this post have well and truly sold unto my son-in-law, Narcisso Bourgeat, a resident of this district, a tract of land eighty-four arpents front and forty-two in depth, on each side of the stream called the Source of the Hot Springs, about two leagues from where it flows into the Ouachita river, having the Source of the Hot Springs as a centre, the boundary lines on the east and west running parallel to their full depth, bounded on both sides by public lands, being the same property acquired by me by

grant from Stephen Miro, then governor of these provinces, under date of December 12th, 1787. I hereby sell unto the said Bourgeat the said property, with all its rights, ways, and servitudes, free from all incumbrances, for the sum of $1,200 cash to me in hand well and truly paid, for which I give him receipt; hereby waiving the exception "*non numerata pecunia*," and grant formal acquittance thereof*r*. Hereby giving full ownership unto said Bourgeat and transferring to him all my right and title to said property, with power to sell, exchange or barter the same at his option, and delivering the same to him by this deed, which I acknowledge as a real delivery, and relieve him from the resort to legal proceedings to obtain possession. I pledge my present and future property to the validity of this sale, and waive the rights of redemption and all laws in my favor.

And, *I*, Narcisso Bourgeat, being present, declare that I accept said property and receive it on the same terms and to the same extent as it has been sold to me, giving a full receipt for the same.

In testimony of which this deed is signed at Ouachita post, on November 25th, 1803.

I, Vinciente Fernandez Fejeiro, li-utenant in the Louisiana regiment of infantry, military and civil commandant of this post, declare that the parties to this deed are well known to me; that the deed was signed by Baron Bastorp and Joseph Pomet, as witnesses in the presence of Alex. Breard, Charles Bettin, Francisco Cavet, all residents of this neighborhood.

Exhibit D.

I, the undersigned, Narcisso Bourgeat, do by these presents retrocede to John Filhiol a tract of land three leagues front and one in depth, situated on Bay*au* Darquelon, also a tract one league square, situated at the mouth of the Hot Springs creek where it flows into the Ouachita, being the same property which he sold to me by act passed before Vincent Fernandez Texeico, then commandant of Ouachita post, resell to him for the same sum for which he sold to me, and which sum he has repaid me, and for which I hereby give receipt and transfer to him the said property.

In testimony of which I have signed this deed at Pointe Coupee this 17th July 1806.

(Signed) NARCISSO BOURGEAT.

I certify that the present retrocession has been passed in my presence on the day and year above written.

J. POYDRAS,
Judge of the Court of the Parish of Pte. Coupee.

Endorsed: Filed and writ issued July 25th, 1894. Ralph L. Goodrich, cl'k.

11 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the ninth day of April, anno Domini one thousand eight hundred and ninety-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit, on Aug. 9, 1894:

MARGARET A. MUSE *et al.*
vs.
ARLINGTON HOTEL COMPANY.

Comes the defendant, by Rose, Hemingway and Rose, Esqrs., its attorneys, and files herein its demurrer to the complaint.

Which demurrer is as follows:

In the United States Circuit Court for the Eastern District of Arkansas, Western Division.

MARGARET A. MUSE *et al.*
vs.
THE ARLINGTON HOTEL COMPANY.

1. Comes said defendant and demurs to said complaint because the same does not state facts sufficient to constitute a cause of action.

2. Because it appears by said complaint that if the plaintiffs have any remedy on the facts stated, it must be pursued in a court
12 of equity and not in a court of law.

ROSE, HEMINGWAY AND ROSE,
For Defendant.

Filed August 9, 1894.

RALPH L. GOODRICH, *Clerk.*

13 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and ninety-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit, on Oct. 29, 1894:

MARGARET A. MUSE *et al.*
vs.
ARLINGTON HOTEL COMPANY.

Comes the defendant, by Rose, Hemingway and Rose, Esqrs., its attorneys, and files herein its motion to compel the plaintiffs to file herein the original exhibits.

Which motion is as follows:

Comes the said defendant and moves the court to require the plaintiffs to file in this court the originals of the exhibits referred to in the complaint herein.

ROSE, HEMINGWAY AND ROSE,
For Defendant.

Filed October 29, 1894.

RALPH L. GOODRICH, *Clerk.*

On October 31, 1894, as follows:

On this day came the defendant, by Rose, Hemingway and
14 Rose, Esqrs., its attorneys, and on their motion leave is given to the defendant to amend its demurrer herein by adding additional grounds of demurrer.

On November 5, 1894, as follows:

Now, on this day, came the defendant, by Rose, Hemingway and Rose, Esqrs., its attorneys, and, by leave of the court, files here its exceptions to the documentary evidence annexed to the complaint herein, and, on the motion of said defendant, it is now ordered that the plaintiffs produce and file in this court, within fifteen days from this date, the originals of the documents, copies of which are filed with the complaint herein.

Which exceptions to evidence are as follows:

Come- said defendant and excepts to the so-called land grant made an exhibit of evidence, marked Exhibit A to complaint, because:

1. The said instrument does not purport to be official or to come from any official depository.

And said defendant excepts also to the paper purporting to be a survey made by Don Carlos Trudeau, marked Exhibit B to the complaint, because:

1. It does not purport to be official.
2. It does not purport to come from any official depository.
3. Because it shows no such survey as is required by law to sustain the pretended Spanish grant set up in said complaint.

15 And the said defendant excepts to the instrument purporting to be a conveyance by John Filhiol, marked Exhibit C to said complaint, because:

1. The said deed does not purport to have been signed by the grantor therein.

2. Because the same does not describe the land set forth in the complaint herein.

3. The said deed does not purport to come from any official source or ever to have been filed in any office.

4. It is not authenticated, as required by law.

The defendant also excepts to the instrument purported to be a retrocession by Narcisso Bourgeat, a copy of which is marked Exhibit D to the complaint herein, because:

1. It is not authenticated in a manner required by law.
2. It does not purport to come from any official source.
3. It does not purport to have come from any official repository of conveyances of lands.
4. It does not describe the lands mentioned in the complaint.

ROSE, HEMINGWAY AND ROSE,
For Defendant.

Filed November 5, 1894.

RALPH L. GOODRICH, *Clerk.*

16 On November 20, 1894, as follows:

Now, on this day, come the plaintiffs, by E. W. Rector, Esqr., their attorney, and by leave of the court the- file here five photographs of documents referred to in their complaint, and also certified copy of Exhibits A and B filed with said complaint.

Which photographs are as follows:

(Here follow photographs marked pp. 17, 18, 19, 20, & 21, which are omitted in printing per stipulation.)

22 On December 17, 1894, as follows:

Come the plaintiffs, by E. W. Rector, Dan. W. Jones, and C. J. Boatner, Esqrs., their attorneys, and comes the defendant, by Rose, Hemingway and Rose, Esqrs., its attorneys, and it is ordered by the court that the demurrer to the complaint be set down for hearing on the second Monday of March, 1895.

23 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, anno Domini one thousand eight hundred and ninety-five, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 18, 1895:

MARGARET A. MUSE *et al.*
vs.
ARLINGTON HOTEL COMPANY.

Come the plaintiffs, by C. J. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys, and file herein their amended complaint and exhibits and offered to file motion to strike from the files the defendant's exceptions to plaintiffs' evidence of title, but on objection made by the defendant said motion was over-

ruled; to which the plaintiffs except; and comes the defendant, by Rose, Hemingway and Rose, Esqrs., and Joseph W. House, Esqr., district attorney, its attorneys, and files its demurrer to the amended complaint, and the same is heard, argued, and the argument hereof not being concluded, the same is continued until tomorrow morning.

Which motion to strike is as follows:

Come the said plaintiffs, by attorney, and move the court to strike from the files the exceptions filed by said defendant to plaintiffs' evidences of title because they say said exceptions are unauthorized by law and encumber the records.

24 C. J. BOATNER,
E. W. RECTOR,
DAN. W. JONES AND McCAIN,
For Plaintiffs.

Filed April 18, 1895.

RALPH L. GOODRICH, *Clerk.*

Which amended complaint and exhibits are as follows:

United States Circuit Court for the Eastern District of Arkansas, Western Division.

MARGARET A. MUSE, HYPOLITE FILHIOL, THOMAS J. WATTS, HARRIETT L. WATKINS, HATTIE B. BURCH, ROLAND M. FILHIOL, JEROME BRES, BENNEDETTE H. BRES, JAMES L. SANFORD, JULIA M. WATTS, MARY A. WATTS, HARDY H. FILHIOL, HYPOLITE BRES, ALBERTA D. SANFORD, by Her Mother and Next Friend, MARY A. DEMPSEY; FRANK C. BRES, FERDINAND A. FENNER, BLANCHE F. POWER, ROBERT W. FENNER, LIZZIE S. COCHRAN, ROBERT R. SANFORD, MARY A. BRES, CHARLES C. SANFORD, and ALICE F. SOUTH, Heirs-at-law of DON JUAN FILHIOL,

vs.

ARLINGTON HOTEL COMPANY.

Amended Complaint.

The plaintiffs state that they bring this suit against the defendant, The Arlington Hotel Company, a corporation organized under the laws of Arkansas and doing business at the city of Hot
25 Springs, in said State, and for cause of action say they are all non-residents of the State of Arkansas, and that all of them are citizens and residents of the United States of America, except the plaintiff Alice F. South, who is a citizen and resident of Coahuila, Mexico, and that of said plaintiffs Margaret A. Muse, Hypolite Filhiol, Francis J. Watts, Harriet L. Watkins, Roland M. Filhiol, Jerome Bres, Benedette H. Bres, Hattie S. Burch, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hypolite Bres, and Alberta D. Sanford, a minor, are citizens and residents of the State of Louisiana; Frank C. Bres, Blanche F. Power, Robert W. Fenner, and Ferdinand A. Fenner are citizens and resi-

dents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanf*rod* are citizens and residents of the State of Mississippi, and Mary A. Bres is a citizen and resident of the State of Illinois; that they are the only heirs-at-law of Don Juan Filhiol, who died a citizen of the Territory of Louisiana, in the year 1821, intestate; that they are owners in fee-simple of the league of land, hereinafter described, lying in the county of Garland and State of Arkansas.

Plaintiffs state that their ancestor, Don Juan Filhiol, was born at Eymet, in Perigord, in the department of Dardongue, Arrondessement Bergerac, France, September 21, 1740; that he left France in 1763 and came to the island of San Domingo; that he left the island of San Domingo in 1779 and came to Philadelphia with the intention to join the Count D'Estaing and return with his squadron to France, but that divers events prevented his carrying out this intention and he changed his destination and arrived in New Orleans, Louisiana, in May, 1779; that having lost his vessel by a hurricane in the month of August, 1779, and the war between Spain and England having been declared, he remained in Louisiana and joined the volunteers when the Spaniards took Florida and Pensacola; that in the year 1783 he was appointed by the King of
26 Spain captain of the army and commandant of the militia and assigned to duty at the post of Ouachita, Louisiana, under instructions from Don Esteven Miro, the governor general of the province of Louisiana, dated at New Orleans.

That on December 12, 1787, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land, whereon the governor ordered said land applied for to be surveyed, and thereafter and before the 22nd day of February, 1788, Don Carlos Trudeau, the then surveyor general of the province of Louisiana, made a survey of said land in accordance with the law then existing, and made a report thereof with figurative plan and procès verbal in due form, in and by which said land was described as follows, to wit: A tract of land with a front of 84 arpens and a depth of 42 arpens on each side of the stream called "La Source d'eau Chaude," about two leagues distant from its entrance into the Ouachita, having the hot springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by lands belonging to the Crown. Said survey, figurative plan, and procès verbal have been lost or destroyed and cannot be produced by plaintiff; and on February 22nd, 1788, the said Don Estevan Miro, as governor of said province, did make and deliver to the said Don Juan Filhiol a grant for a certain league of land, a description of which grant and of the land granted is hereinafter more fully described.

That said grant of land was made to their said ancestor, Don Juan Filhiol, while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity of commandant of that then important post; that the said Don Estevan Miro, in his capacity as governor general of Louisiana, was, by the Spanish colonial laws, vested with power to make

grants of land and convey by said grants the absolute fee-simple to the lands thus granted.

27 That said land so granted by the said Don Estevan Miro, as governor, on the 22nd of February, 1788, to the said Don Juan Filhiol consisted of a certain one square league of land with the hot springs at the city of Hot Springs, in said county and State aforesaid, as the centre of said league, the description, metes, and bounds of which league of land are more fully and accurately measured and described in said survey, figurative plan, and proces verbal of the said Don Carlos Trudeau, hereinbefore mentioned. Said grant is in the Spanish language, but when translated into the English language is as follows:

From the land archives.

The governor and intendent of the provinces of Louisiana and Florida West and inspector of troops, etc.:

Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of the post of Ouachita, of a tract of land of one square league, situated in the district of Arcansas on the north side of River Ouachita, at about two leagues and a half distance from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve those surveys, using the faculty which the King has vested in us, and assign in his royal name unto the said Julian Filhiol the said league of land in order that he may dispose of the same and of the usufruct thereof as his own.

We give these presents under our own hand, sealed with the seal of our arms and attested by the undersigned secretary of His Majesty in this government and intendence.

28 In New Orleans, on the 22nd day of February, 1788.

(Signed) ESTEVAN MIRO.

By mandate of His Excellency:

(Signed) ANDRES LOPEZ ARMESTO.

Registered.

That after the making and delivery of said grant to the said Don Juan Filhiol by the said Miro as governor of said province as aforesaid, to wit, on the 6th day of December, 1788, one Carlos Trudeaux, who was then land and particular surveyor of the province of Louisiana, made, executed, and delivered a certificate of measurement of said grant of land to the said Don Juan Filhiol, which certificate of measurement so made and delivered is in the Spanish language, but which when translated in the English language is as follows, to wit:

Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estevan Miro, brigadier of the R. ex. gob., intendent of the province- of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters, and in conformity with the aforesaid order, I certify having meas-red in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies in conformity with * * * of the 6th of the present month of December and of the current year 1788.

(Signed) CARLOS TRUDEAU.

29 That the making and delivery of said certificate by the said Trudeau was a delivery of the judicial possession of said land, and had the force and effect of segregating said tract from the public domain, and with the grant aforesaid vested full and complete title thereto in the said grantee.

Said plaintiffs further state that the said Don Juan Filhiol, their said ancestor, did sell and convey by deed the said league of land described herein to his son-in-law, Narcisso Bourgeat, on the 25th day of November, 1803; that said deed from said Don Juan Filhiol to the said Narcisso Bourgest was passed before Don Vinciente Fernandez Fejevio, lieutenant of the regiment of infantry of Louisiana and military and civil commandant of the district and jurisdiction of Ouachita, which deed was witnessed by the Senior Baron d'Bastrop and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all of whom were principal men in Ouachita at the date thereof; that said deed from the said Don Juan Filhiol to the said Narcisso Bourgeat is in the Spanish language, but which when translated in the English language is as follows, to wit:

Be it known to all to whom this act may come, that I, Don Juan Filhiol, captain in the army, commandant of the militia of this district, do authenticate that I really and effectuall- do sell to Narcisso Bourgeat, my son-in-law and resident of this district, a tract of land with a front of eighty-four arpints, and a depth of forty-two arpints on each side of the stream called " La Source d'eau Chaude " about two leagues distance from its entrance into the Ouachita, having the hot springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown—the same which belongs to me by virtue of a grant obtained from Senor Don Estevan Miro,

then governor of these provinces, dated the 12th day of
30 December of the year 1787. I sell the same to the above-named Bourgeat with all its ways of entrance and exits, uses, stated customs and servitudes, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge the receipt and to obviate the actual receipt thereof at this moment, I renounce the exception of *numerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession use, dominion of seign-ory I may have had or held in and to said tract of land and do grant unto and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction and insure the reality and perfection of this title I hereby affect and obligate thereto all the property I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular and being present at the passing of this act, I, the above-named Narcisso Bourgeat, accept the same—acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed in the district of Ouachita on the 25th day of the month of November one thousand eight hundred and three.

I, Don Vincente Fernandez Texario, lieutenant of the regiment of infantry of Louisiana and military and civil commander
31 of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Betin and Don Francisco Cavet all of whom are residents of this district.

The interlineation Cavet is part of this act, and erasure Betin is not.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Done within my jurisdiction.

VINCENTE FERNANDEZ TEXARIO.

BARON DE BASTROP.
TN. POMET.

Which deed was immediately thereafter duly reported in the proper office of the province of Louisiana, in accordance with the law then existing, and was afterwards duly recorded in said office. Copies of said deed and of the deed of retrocession from said Bourgeat to said Filhiol, hereinafter mentioned, in the original Spanish language, properly certified by the officers in charge of them, attached thereto and endorsed thereon, are herewith filed, marked respect-

ively Exhibits X and Z, the originals being still kept on file as required by law.

That the said Narcisso Bourgeat retroceded the same lands sold to him as aforesaid by the said Don Juan Filhiol to the said Don Juan Filhiol by a deed passed before J. Poydras, judge of the court of the parish of Pointe Coupee, July 17th, 1806, and that their said ancestor, Don Juan Filhiol, never thereafter parted with his title to said land.

That the said deed from the said Narcisso Bourgeat to the said Don Juan Filhiol was filed for record and recorded in the office of the recorder of the parish of Pointe Coupee, in the State of
32 Louisiana, on the 17th of July, 1806, and that said deed, together with a certificate of recordation, *are* as follows, said deed being in the Spanish language, but here translated into the English language, to wit:

I, the undersigned Narcisso Bourgeat, retrocede by these presents to Monsieiur Jean Filhiol, a piece of land of three leagues front and one in depth, situated on the Bayou Darquelon; and one also of a league square situate at the Source of the Hot Water of the Ouachita, the which lands he sold to me by deed given before Don Vincente Fernandez Texario, commandant at that time at said Ouachita, and which I return to him for the same price and sum which he had parted with them to me and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it appertaining as his right in belief of which I have signed at Pointe Coupee the seventeenth day of July one thousand eight hundred and six.

(Signed) NARCISSO BOURGEAT.

I certify that the presented retrocession has been made in my presence the same day as that above.

(Signed) J. POYDRAS,
Judge of the Court of Pointe Coupee.

STATE OF LOUISIANA, }
Parish of Pointe Coupee. }

I, the undersigned, deputy clerk and *ex officio* deputy recorder of mortgages, do hereby certify that the foregoing and within is a true copy of the original on file and of record in this office; which original has been duly recorded in this office on the 17th of July, 1806, under No. 2607.

Witness my official signature and seal of office this 1st day of June, 1889.

[SEAL.] A. J. DAYINS, *Recorder.*

33 Plaintiffs state that at the time of the making of said deeds the Spanish colonial law forbade any public officer having authority to receive acknowledgments of and pass deeds for the conveyance of lands to pass such deed or receive acknowledgment

thereof unless they knew that vendor had a title to the lands proposed to be sold.

Plaintiffs further state that their said ancestor, the said Don Juan Filhiol, in the year 1819 leased said Hot Springs to one Dr. Stephen P. Wilson for five years, and that shortly after making said lease to the said Wilson, to wit, in the year 1821, the said Filhiol died, as aforesaid, and that since the death of their said ancestor plaintiffs have always urged their title to said property and employed agents and attorneys to do so for them, but that during a large part of this interval they have been embarrassed by the want of said original grant for said land, the same having, without the knowledge of the heirs of said Don Juan Filhiol, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and after whose death, in 1843, the grant was mislaid; that often and repeated searches were made by the said plaintiffs for said grant, but that they failed to find it; that lately, to wit, on or about the — day of ——, 1883, said original grant from said Don Estevan Miro, the Spanish governor general of the province of Louisiana, to the said Don Juan Filhiol was found by Mrs. Matilda E. Moore, of Orleans parish, Louisiana, among the effects of her mother, who was the widow of the said Resin P. Bowie, and that said grant was delivered by said Matilda E. Moore to the plaintiff Margaret A. Muse, who is a daughter of Narcisso Bourgeat and Marie Barbe Filhiol and a granddaughter of Don Juan Filhiol, in the year 1883; that printed copies of the affidavits of Matilda E. Moore, Ellen M. Coates, Margaret Adelaide Muse, and Hyp-lite Filhiol as to the finding and delivery of said original grant and certificate of
34 measurement or survey of the said Carlos Trudeau, marked 1, 2, 3, and 4, are attached hereto and filed herewith.

Said plaintiffs state that they claim title to said league of land so granted by said Estevan Miro, as governor of said province, to the said Juan Filhiol, as the heirs-at-law of said Juan Filhiol, and they state that they will rely upon the following written evidences of their title for the maintenance of this action:

First. On the grant made by Don Estevan Miro, as governor of the province of Louisiana, on February 22nd, 1788, to Don Juan Filhiol, a *a* translation of which grant is filed herewith, marked "Exhibit A," and made part hereof.

Second. On the certificate of measurement or survey made by Carlos Trudeau, surveyor of the province of Louisiana, on December 6th, 1788, and delivered by him on that date to Don Juan Filhiol, a translation of which, marked "Exhibit B," is filed herewith and made part hereof.

Third. On the deed of said land made by Don Juan Filhiol to Narcisso Bourgeat on November 25th, 1803, a translation of which is herewith filed, marked "Exhibit C," and made part hereof.

Fourth. On the deed or retrocession of said land made by Narcisso Bourgeat to Don Juan Filhiol on the 17th of July, 1806, a translation of which deed or retrocession is herewith filed, marked "Exhibit D," and made part hereof.

Fifth. On the 3rd article of the treaty between the United

States of America and the French Republic of April 30th, 1803, which was ratified on the 21st of October, 1803.

Sixth. On the fifth amendment to the Constitution of the United States.

That said defendant is in the unlawful possession of a certain portion of said league of land, which portion is included in the Hot Springs Mountain reservation, in the city of Hot Springs, county of Garland, and State of Arkansas, the boundary lines of which
35 reservation were established by the Hot Springs commission by public surveys in pursuance of the laws of the United States, said lands so unlawfully possessed by said defendant being more particularly described as follows, to wit: Commencing at the quarter-section corner between sections thirty-two and thirty-three, in township two south, range nineteen west, of the fifth principal meridian, in the city of Hot Springs, county of Garland, and State of Arkansas, and run thence north seventy-seven degrees and thirty minutes east four hundred and thirty-seven feet to a stone monument known as angle No. 33 of said Hot Springs Mountain reservation; thence along the line of said reservation, between angles 33 and 34 thereof, fifteen feet to the point of beginning; thence south five degrees east three hundred and twenty-two feet; thence north eighty-five degrees east seventy-six feet; thence north five degrees west ninety-nine and eighth-tenths feet; thence north eighty-five degrees east sixty feet; thence north five degrees west fifty-seven feet; thence south eighty-five degrees west seventy-six feet; thence north five degrees west fifteen and eight-tenths feet; thence north eighty-five degrees east twenty-nine feet; thence north five degrees west eighty-seven and eight-tenths feet; thence south eighty-five degrees west thirty feet; thence north five degrees west twenty feet; thence north eighty-five degrees east one hundred and seventy-four and seven-tenths feet; thence north five degrees west fifty-three feet; thence south eighty-five degrees west forty-eight feet; thence north five degrees west eighty feet; thence north eighty-five degrees east fifty-four feet; thence north five degrees west one hundred feet to a point between angles numbering 33 and 34 of said Hot Springs Mountain reservation three hundred and twenty-nine and seven-tenths feet from said angle No. 33; thence along said reservation line south westward one hundred and thirty-eight and seven-
36 tenths feet; thence south five degrees east one hundred and six feet; thence one hundred and thirty feet south eighty-five degrees west to the point of beginning, all courses being magnetic.

The said defendant has been in the unlawful possession of said portion of said land so particularly described as aforesaid since the third day of March, eighteen hundred and ninety-two, during all of which time the said plaintiffs have had title to said land, and still have, and the right to the possession thereof, and plaintiffs say that by reason of the said wrongful possession of said land by said defendant they have sustained damages in the sum of twenty thousand dollars. Wherefore they pray judgment for the recovery of said land so unlawfully held by said defendant and for the posses-

sion thereof, and for said damages for the unlawful detention of the same.

(Signed) C. J. BOATNER,
DAN. W. JONES,
E. W. RECTOR,
Attorneys for Plaintiff.

STATE OF ARKANSAS, }
County of Pulaski. }

E. W. Rector says that he is the attorney for the plaintiffs in this suit, who are absent from the State of Arkansas, and that he believes the statements contained in said complaint are true.

E. W. RECTOR.

Subscribed and sworn to before me the 18th day of April, 1894.
RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

For Exhibit "A," referred to in amended complaint, see page 7.

37 For Exhibit "B," referred to in amended complaint, see page 8.

For Exhibit "C," referred to in amended complaint, see page 9.

For Exhibit "D," referred to in amended complaint, see page 10.

Endorsed: Filed April 18th, 1895. Ralph L. Goodrich, clerk.

38 EXHIBIT X TO COMPLAINT.

(Copy.)

MONROE, LOUISIANA, *June* 7, 1890.

Hon. John McEnery, New Orleans, Louisiana.

DEAR SIR: In reply to yours of the 4th instant I herewith enclose and return copy with amended certificate, &c. I am unable to certify as to the reason why the deed was not recorded earlier, but I notice a petition from L. F. Lamy, parish judge, to president and members of the police jury of Ouachita parish under date of June 5th, 1832, setting forth that original deeds remain unrecorded in the office of the recorder, and asking that body to make some provision for having them placed of record, being written in French and Spanish, and the difficulty of finding a competent person to record them, I presume, was the cause of their being kept so long unrecorded.

Very respectfully,
(Signed) R. A. YOUNG.

Sepan quontas esta carta vienen como yo Don Juan Filhiol, Capitan de exto y commandante de milicias de este puerto que otorgo que vendo realment y con efecto a Don Narcisso Bourgeat Mi hierno y vecino de este distrito una tierra de ochenta y quartro arpanes de frente y quaranta y dos de profundidad a cada lado del rio llamado

de la "source dean chande" distante de su entrada en el del Ou-chita como de dos leguas teniendo el manantial de Aquas
39 Calientes par centro corriendo sus limites a la profundidad leste, oeste, paraalelas, limitado por ambos lados con tierras realengas, la misma que me pertenece por averla obtenido de consecion del Sor Don Estevan Miro Gebernado de estas provincias entonces, en fechada doce de Diciembre del Uno de Mil Setecientos Ochenta y siete y vela vendo al ante, dicho con todas sus entrados y validas usos costumbras duenos y servidumbres libre de todo gravamen e hipoteca en el precio de mil y dos cientos prsos fuertes que me ha pagoda de contado de cuya cantidad me day par entregado a mi voluntad y por no ser de presente la entrega renuncio la escepion de la non numerata pecunia y otorga formal recibo, mediante lo qual me aparto y Separo del dueno de propriedad posesion utis Dominio y Seno rio que a dica tierra avia y tenia y todo lo cedo renuncio y traspaso en el comparador y en su que causa y dueno huviere por que como proprio suyo la posea venda cambie o enagene a su voluntad por esta escritura que a su favor otorgo en senas de real entraga conto que ha de ser visto aver adquirido su posesion sin que resesite dedtna prieva de que lo relevo y me obligo a la evicion seguridad y saneamiento de esta venta en toda forma de Dueno con mis bienes avidos y por a ver doy aqui por uncenta la clausa la quarantigia y renuncio los leyes de mi favor con la grat enforma y estando presente al otorgamiento de esta escritura, yo el referido Dn. Narciso Bourgeat la acepto a mi favor recibiendo comprada dica tierra en la cantidad y conformidad que me va vendida de ella me doy—por entregada a mi voluntad, y otorgo formal recibo. En cuyo testimonio es fecha la carta en el Puerto de Ouachita a los veinte y cinco dias del mes de Noviembre del ano Mil Ochocientos y tres yo Dn. Viz Teru Fejerio Teniente del regimento infanteria de la Louisiana y comandante militar y politico de
40 este Puerto y su jurisdicion certifico—conoxco a los otorgantes que firmaron siendo testegos de asistencia el sor Baron de Bastrop y Du Yosef Pomet presencia de Don Alexandro Breard Don Carlos Bettin y Du Francisco Cavet todos de este vecindario entre renglones.

Cavet—vale Bettin—rayado—no vale.

NARCISSO BOURGEAT.

JUAN FILHIOL.

Anto mi comandante,

VIZ. FENR. FEJERIO.

BARON DE BASTROP.
Y. POMET.

[SEAL.]

STATE OF LOUISIANA, }
Parish of Ouachita. }

I hereby certify that the above and foregoing is a true and correct copy of the original deed on file and of record in the notarial records of this parish.

Witness my signature and seal of office this 10th day of June, 1889.

R. A. YOUNG,
[SEAL.] *Deputy Clerk Fifth District Court and ex Officio Recorder and Notary Public.*

STATE OF LOUISIANA, }
Parish of Ouachita. }

I hereby certify that the above and foregoing is a true and complete copy of the original deed, with endorsements thereon,
41 now on file in my office and of record in Notarial Book Z, page 170, of the records of my office.

Witness my signature and seal of office this 10th day of June, A. D. 1889.

R. A. YOUNG,
Deputy Clerk Fifth District Court and ex Officio Recorder in and for Ouachita Parish, Louisiana. [SEAL.]

Endorsed as follows: John Filhiol to Narcisse Bourgeat. Deed.

STATE OF LOUISIANA, }
Parish of Ouachita. }

I, Lewis F. Lamy, parish judge in and for said parish and State, do hereby certify the within to be duly recorded in my office, in Record Book "Z," folio 170.

Given under my hand and seal of office on this 24th day of June, A. D. 1833.

LEWIS F. LAMY,
Parish Judge. [SEAL.]

Certified copy.

Je soussique Narcisso Bourgeat rotro cede par ce present a Monsieur Jean Filhiol, une terre de trois lienes de face X une de profondeur, situee sue le Bayou Darguelon; eh une idam d'une liene enquarri, situee a la source D'ean Chande au Ouachita les quelles terres il m'a vendu par acte passe pardevant Don Vincent Fernandos Texcico, commandant pour los au dit Ouachita, et que je buiravends pour le meme prij et somme quil me les avait haisse, et qu'et m'a rembouise et pourquvi je li tiens gentle pour quid
42 en joussecomme d'an lien a lai appaitinant, en foi de quoi J ai signe a la Ptr. Coupic le dixsept Juallet mil huit cent siz.

(Signed) NARCISSO BOURGEAT.

Je certifie que la presente retrocession a ete faite et au gendessus.

(Signed) J. POYDRAS,
Juge du Conte de la Ptr. Coupie.

STATE OF LOUISIANA, }
Parish of Pointe Coupee. }

I, the undersigned, deputy clerk and *ex officio* deputy recorder of mortgages, — that the foregoing and herewith is a true copy of the

original on file and of record in this office; which original has been duly recorded in this office on the 17th July, 1806, under No. 2607.

Witness my official signature and seal of office this 1st day of June, 1889.

A. J. DAYINS, *Recorder*. [SEAL.]

Endorsed as follows: Retrocession de tene N. Bourgeat, a Jean Filhiol. July 17th, 1806.

43 EXHIBITS.

No. 1.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Matilda E. Moore, widow of Joseph H. Moore, of the above parish and State, being duly sworn, deposes and says that she was born at Opelousas, Louisiana, August 15, 1817, and is the daughter of Rezin P. Bowie, deceased, who was a land agent versed in the practice and prosecution of Spanish and French land claims. Deponent further declares that she heard her father and James Fort Muse, husband of Mrs. Margaret A. Muse, one of the heirs of Don Juan Filhiol, speak together about the claim the heirs of said Filhiol have to Hot Springs, in Arkansas; that she knows the said heirs have for many years claimed and attempted to establish their rights to said property. Deponent further declares that her father, said Rezin P. Bowie, died about the year 1841, and that he left a large number of papers relating to land claims; that after his death parties applied to her mother and herself for documents relative to the Hot Springs claim of the Filhiol heirs; that search was made among her father's papers for them, but without success; that the greater part of her father's papers relating to land claims were taken possession of and carried off by one John Wilson, who had been interested with her father in the prosecution of land claims, and she was under the impression the Hot Springs papers were among those carried off by Wilson. Deponent further declares that her mother, widow of said Rezin P. Bowie, died about August 25, 1875; that after her death, while looking over her effects, deponent found in an old trunk containing relics and papers which had belonged to her mother
44 *she found* a package of papers rolled in old an newspaper, marked "Papers belonging to Mrs. Bowie," which, on examining, she exclaimed, "Why, here are Mrs. Muse's Hot Springs papers." Deponent declares said package contained the original grant to Don Juan Filhiol by Estevan Miro, a certificate of survey signed Carlos Trudeau, and a pen-and-ink sketch or plat of survey, and other papers. Deponent further declares that she gave said package of papers to Mrs. Margaret A. Muse, widow of the aforesaid James Fort Muse, some time during the year 1883. Deponent further declares that the pen-and-ink sketch or plat of survey which accompanied the papers delivered by her to Mrs. Muse was similar in ap-

pearance to the plats or plans of surveys of French and Spanish grants and was executed on paper similar in appearance to the paper upon which are written the grant by Miro and the certificate of survey of Trudeau and was signed by Carlos Trudeau.

MATILDA E. MOORE.

Sworn to and subscribed before me this 20th day of September, 1889, A. D.

FRANK HEBERT,
Notary Public. [SEAL.]

No. 1½.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Matilda E. Moore, widow, a resident of the above parish and State, being duly sworn, deposes and says she has sufficient knowledge of the Spanish language to know the purport of a grant written in that language, and that she is familiar with the form and
45 appearances of land grants made by the French and Spanish governments, having seen a number of them in the possession of her father while he was engaged in attending to land claims.

MATILDA E. MOORE.

Sworn to and subscribed before me this 5th day of October, 1889.

FRANK HEBERT,
Notary Public. [SEAL.]

No. 2.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Ellen M. Coates, widow, a resident of the city of New Orleans, being duly sworn, deposes and says she is a daughter of James Fort Muse and Margaret A. Bourgeat, and a great granddaughter of Don Juan Filhiol, who was commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the provence of Louisiana, made a grant in 1788 of a league square of land in the district of Arkansas so as to include the Hot Springs. Deponent further declares that Don Juan Filhiol and his heirs, after his death, in 1821, always claimed said land as theirs under the aforesaid grant; that for more than fifty years the heirs have made continual efforts to obtain possession of said property and to establish their rights, employing skilled agents and attorneys for that purpose, among other agents one Rezin P. Bowie, who died about the year 1841. Deponent further declares that the original grant papers for the aforesaid property were mislaid or suppressed until the year 1883, when one Mrs. Matilda E. Moore, widow, a resident of
the city of New Orleans, and a daughter of the aforesaid
46 Rezin P. Bowie, delivered to deponent's mother, Mrs. Margaret A. Muse, the said grant papers, saying she had found them in an old trunk in which her mother, widow of the said Bowie, had kept her private and family relics. Deponent further

declares that the claim of the Filhiol heirs is based on a complete grant; that up to the year 1870 the claimants for land in Arkansas under complete grants had no way of proceeding against the United States, either in court or before the land department, as allowed in other States by divers acts of Congress; that by act of Congress approved June 11, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," but ninety days were allowed claimants in which to file suits in the Court of Claims, while in other States years were allowed; that during the time allowed by the aforesaid act one Thomas S. Drew, of Arkansas, was the agent of the heirs of Filhiol; that he obtained many documents and papers relating to their claim from them, but he failed either to file suit in the Court of Claims or to bring their claim to the notice of Congress; that without notice to the heirs he summarily abandoned their case, and they have never been able to recover the papers placed in his hands, he having left Arkansas; that after his defection and after the expiration of the time allowed by the aforesaid act, in October, 1873, the claim was placed in the hands of Judge W. J. Q. Baker, of Monroe, who, after taking a large amount of testimony and attempting to obtain legislative action by Congress, which he asserted was prevented by the opposition of the suitors for the same property, then in the Court of Claims, and the expiration of the session of the Congress, either abandoned the case or died while prosecuting it. Deponent further declares that since the recovery of the original grant papers in 1883, the want of which has always been asserted to be the
47 stumbling block in establishing the claim, she has been acting for her mother, whose great age has prevented her taking any active part in attending to this claim, and has made every effort to procure the necessary legal assistance to prosecute it; that she has submitted the papers to several lawyers for examination, with the view of placing the claim in their hands for prosecution, but, on account of her moderate means, without success until the present year; that the numerous heirs of Don Juan Filhiol are scattered in Louisiana, Mississippi, Texas, and Mexico; that the necessity of unity of action on their part, the great distance separating them, and the difficulty in communicating with them, together with the lack of means to obtain legal assistance, has caused the apparent delay in the application for relief, and it was only in the present year that her present attorney informed her that the Congress of the United States would grant the heirs, upon a proper showing, the same facilities allowed to other claimants to prosecute their rights in the courts of the country.

ELLEN M. COATES.

Sworn to and subscribed before me this nineteenth day of September, 1889, A. D.

FRANK HEBERT,
Notary Public. [SEAL.]

No. 3.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Margaret Adelaide Muse, widow, of the above parish and State, being duly sworn, deposes and says she was born December 5, 1803, and is the daughter of Narcisso Bourjeat and Marie
48 Barbe Filhiol, and a granddaughter of Don Juan Filhiol, who was Spanish commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the provence of Louisiana, on February 22, 1788, made a grant of a league square of land in the district of Arkansas so as to include the Hot Springs; that she married James Fort Muse, a lawyer, February 22, 1821, and that he died January 14, 1843. Deponent further declares that in 1803 her grandfather, Don Juan Filhiol, sold the tract of land granted as above to her father, Narcisso Bourjeat; that in 1806 Narcisso Bourjeat retroceded the same land to Don Juan Filhiol. Deponent further declares the original grant papers to the aforesaid land were lost to the Filhiol heirs until a few years since, when Mrs. Matilda E. Moore, widow, a resident of the city of New Orleans and a daughter of one Rezin P. Bowie, who about the year 1840 had been employed by the Filhiol heirs to prosecute and establish their title to the above land, delivered to deponent the original Spanish grant of Don Estevan Miro and the certificate of survey of Don Carlos Trudeau, royal surveyor of the provence of Louisiana, showing a survey by him of the league square of land granted above so as to include the Hot Springs in Arkansas, saying she had found them in an old trunk which had not been opened for years, among other relics of her mother, deceased wife of the aforesaid Rezin P. Bowie. Deponent further declares that prior to the recovery of the original grant papers aforesaid she and the other heirs had used due diligence in prosecuting their rights under said Spanish grant and had agents and attorneys employed continuously for that purpose for more than fifty years. Deponent declares the documents handed to her by aforesaid widow Moore consisted of the original grant, the certificate of Trudeau, royal surveyor, and a pen-and-ink sketch or plat of survey
49 and other papers. Deponent further declares that owing to her great age she is unable to take any active steps in pushing the claim for the aforesaid lands, and has put the papers in the hands of her daughter, Mrs. Ellen Muse Coates, of New Orleans, for that purpose.

MARGARET A. MUSE.

Sworn to and subscribed before me this 20th day of September, 1889.

FRANK HEBERT,
Notary Public. [SEAL.]

No. 4.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Hypolite Filhiol, of the above parish and State, being duly sworn, deposes and says he is the son of Edmond Landry Grammont Filhiol, and a grandson of Juan or Jean Filhiol, who was Spanish commandant of the post of Ouachita from 1782 to 1800, and to whom was granted by Don Estevan Miro, governor of the provence of Louisiana in 1788, a tract of land one league square, so as to include the Hot Springs, in the district of Arkansas. Deponent declares that the grant papers to said land were lost or mislaid for many years; that since the death of Don Juan Filhiol, in 1821, his heirs have made repeated and continued efforts to substantiate their claim to said land, having employed numerous lawyers and agents versed in the land laws and practice to prosecute it, but, owing to the loss of the original grant papers, their said agents have never been able to prosecute their claim to a finality; that these agents, after investigating this claim and obtaining all the supporting evidence in the possession of the heirs, have one after the other abandoned
50 its prosecution for the want of the original grant papers from the Spanish government, and that many of the documents placed in the hands of these agents supporting their title the heirs have never been able to recover; that since the expiration of the time allowed by the act of Congress for the institution of proceedings for the Hot Springs, entitled "An act in relation to the Hot Springs reservation in Arkansas," approved June 11, 1870 (U. S. Stats., vol. 16, p. 149), deponent is informed that Mrs. M. A. Muse, one of the heirs of said Don Juan Filhiol, has recovered the said original grant papers to Don Juan Filhiol, which will enable his heirs to substantiate and establish their claim to the said tract of land.

H. FILHIOL.

Sworn to and subscribed before me on this 6th day of September, 1889.

ROB'T RAY,
U. S. Commissioner. [SEAL.]

51 Which demurrer is as follows:

Comes said defendant and demurs to the amended complaint herein, because—

1. It does not state facts sufficient to constitute a cause of action.

2. Because if plaintiffs have any remedy it must be pursued in equity and not at law.

ROSE, HEMINGWAY AND ROSE,
For Defendant.

Filed April 18, 1895.

RALPH L. GOODRICH, *Clerk.*

On April 19th, 1895, as follows:

Come the plaintiffs, by C. J. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys, and comes the defend-

ant, by Rose, Hemingway and Rose, Esqrs., and Joseph W. House, Esqr., district attorney, its attorneys; and the argument on the demurrer not being concluded on yesterday, the same is now resumed; and the argument not being concluded, the same is continued until tomorrow morning.

On April 20, 1895, as follows:

Come the plaintiffs, by C. J. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys, and comes the defendant, by Rose, Hemingway and Rose, Esqrs., and Joseph W.
52 House, Esqr., district attorney, its attorneys; and the argument on the demurrer not beingIconcluded on yesterday, the same is now resumed; and the argument not being concluded, the same is continued until Monday morning at nine o'clock.

On April 22, 1895, as follows:

Comes the defendant, by Rose, Hemingway and Rose, Esqrs., and Joseph W. House, Esqr., district attorney, its attorneys, and by leave of the court files herein its answer, and come the plaintiffs, by J. C. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys; and the argument on the demurrer not being concluded on Saturday, the same is now resumed; and the argument not being concluded, the same is continued until tomorrow morning.

53 Which answer is as follows:

United States Circuit Court, Eastern District of Arkansas, Western Division.

MARGARET A. MUSE *et al.*
vs.
ARLINGTON HOTEL COMPANY.

I.

Comes the said defendant and for answer herein says that as to the citizenship of the several plaintiffs this defendant has not sufficient knowledge or information upon which to found a belief, and therefore requires proof of the same.

II.

That as to the history given by the amended complaint of Don Juan Filhiol defendant says that it has no knowledge or information thereof sufficient to base a belief upon, and therefore requires proof of the same.

III.

Defendant denies that Don Estevan Miro, governor of the provinces of Louisiana, on the 22nd day of February, 1788, granted to the said Filhiol one square league of land, with the hot springs, at the city of Hot Springs, as a center of said league.

IV.

Defendant denies that any grant was made by the said governor to the said Filhiol of any part of the lands mentioned in said amended complaint.

V.

54 Defendant denies that the paper purporting to be from the archives, purporting to be signed by said Miro and dated on the 22nd day of February, 1788, was ever signed or sealed by him.

VI.

It denies that Don Carlos Trudeau, on the 6th day of December, 1788, made any certificate of measurement of said lands for the said Filhiol.

VII.

It denies that said Trudeau at the time held any official position as surveyor which would authorize him to make the said survey an official one.

VIII.

It denies that the said certificate copied in said amended complaint dated the 6th day of the month of December, 1788, was ever signed by the said Carlos Trudeau.

IX.

Defendant says that if said Carlos Trudeau ever signed said certificate it was not signed by him in an official capacity.

X.

It denies that said Filhiol or the plaintiffs, or any one under whom they claim, ever had actual possession of any part of said lands.

XI.

It denies that said Filhiol conveyed said land or any part of it to Narcisso Bourgeat, and denies that said Filhiol ever executed the deed alleged to be inserted in said complaint, and denies that the same was signed by said Filhiol as grantor or by Baron Bastrop and John Pomet or either of them as witnesses thereto.

XII.

It denies that the certificate purporting to be signed by Vinciente Fernandez Techiero was signed, or that he made the certifi-
55 cate purporting to be attached to said deed and to be copied in said amended complaint.

XIII.

Denies that the said Bourgeat retroceded said lands to said Filhiol, as stated in said amended complaint, and denies that the paper

purporting to be a deed from said Bourgeat to Filhiol, copied in said complaint, was ever executed by said Bourgeat, and denies that the same was executed in the presence of J. Poydras, as stated in said amended complaint.

XIV.

As to the allegation made in said amended complaint to the effect that at the time therein mentioned the Spanish colonial law forbade any public officer having authority to receive acknowledgments of deeds for lands, unless they knew that the vendor had the title proposed to be sold, this defendant says that it has no knowledge or information which is sufficient to found a belief upon, and therefore denies the same.

XV.

That as to the allegation in the amended complaint that the said lands were leased by said Filhiol to one Stephen B. Wilson, this defendant says that it has no knowledge or information thereof sufficient to found a belief upon, and therefore it denies the same.

XVI.

As to the allegations made in said amended complaint that said pretended grant from said Miro to said Filhiol was lost at any time, this defendant has no knowledge or information sufficient to found a belief upon, and therefore denies the same.

XVII.

56 That as to whether the plaintiffs are the heirs of the said Filhiol, and as such entitled to bring this suit, this defendant has no knowledge or information sufficient to found a belief upon, and therefore denies the same.

XVIII.

Defendant denies that it has been in the unlawful possession of said property, or any part thereof, or is now in such unlawful possession. On the contrary, said defendant holds the same under a lease granted to it by the authorities of the Government of the United States, the true owner in fee of said land, executed by the Secretary of the Interior to this defendant and dated on the — day of ——, 18—, by which it leased the land in controversy from the United States for a period of five years next ensuing, as will be seen by copy of the lease hereto attached, marked "Exhibit A," and made part hereof.

XIX.

Defendant further says that said pretended grant to said Filhiol, if ever made, was void, because at the time the same was made the land in controversy was in the exclusive possession of the Indians, by whom it had been occupied and owned from time immemorial.

XX.

Also that said survey purporting to have been made by Trudeau, if ever made, was not made, returned, or filed as required by the Spanish laws in force in the province of Louisiana at the time when the same is alleged in the said amended complaint to have been executed.

XXI.

That the lands in suit have been in the actual possession of various persons continuously ever since and before the 1st day of January, 1810, who held the same in subordination to the title of the United States, which was acquired by the cession of the
57 Territory of Louisiana by France to the United States, in 1803, and by a later purchase from the Indians, who had lived on and occupied said lands from time immemorial down to the year 1818, when their title was extinguished by a purchase from them by the United States, and that since the second day of October, 1876, the United States has been in the actual and sole possession of said lands, holding the same in hostility to all the world; that neither the plaintiffs nor their ancestors or those under whom they claim have ever had possession of any part of said lands, and that neither the plaintiffs nor those under whom they claim filed their evidences of title or did other acts prescribed by an act of Congress entitled "An act for ascertaining and adjusting titles and claims to land within the territory of Orleans and the district of Louisiana," which was approved March 2, 1805; that therefore their claim to the lands in dispute herein is forever barred.

XXII.

Defendant says that the Congress of the United States passed an act entitled "An act enabling the claimants of lands within the limits of the State of Missouri and Territory of Arkansas to execute proceedings to try the validity of their claims," which was approved on the 26th day of May, 1824; that neither the plaintiffs nor those under whom they claim title did, within three years after the passage of said act, prosecute to a final decision their claim to said supposed grant. Wherefore the defendant says that the said claim is barred by the act aforesaid.

XXIII.

That the Congress of the United States passed an act entitled "An act in relation to the Hot Springs reservation in Arkansas," approved May 27, 1870, by which it was required that all persons having any claims to the lands in controversy and other
58 lands known as the Hot Springs reservation should institute against the United States, in the Court of Claims, and prosecute to final decision any suit that might be necessary to settle the same, provided that no such suits should be brought at any time after the expiration of ninety days from the passage of said act, and that all claims to any part of said reservation upon which suit

should not be brought under the provisions of this act within the time should be forever barred. Defendant says that neither the plaintiffs nor those under whom they claim title did at any time within said period of ninety days institute any suits in said Court of Claims for the purpose of settling their claim or title to said land. Wherefore defendant says that the said claim is barred by the provisions of said act.

XXIV.

Said defendant says that the plaintiffs' cause of action, if any they had, did not accrue at any time within seven years next before the commencement of this suit.

XXV.

And said defendant for further defense says that the said claim, if any such ever existed, has long ago been abandoned by the said plaintiffs and those under whom they claim title and so has ceased long ago to have any validity whatever and is barred by various statutes of limitation.

XXVI.

Defendant denies that Carlos Trudeau, surveyor general of Louisiana, made any survey and report thereof, as set forth in said complaint.

(Signed) ROSE, HEMINGWAY & ROSE.
J. W. HOUSE.

Endorsed: Filed April 22, 1895. Ralph L. Goodrich, clerk.

59 On April 23, 1895, as follows:

Comes the defendant, by Rose, Hemingway and Rose, Esqrs., and Joseph W. House, Esqr., district attorney, its attorneys, and by leave of the court files herein its additional exceptions to grant from Miro to Filhiol, and come the plaintiffs, by C. J. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys; and the argument on the demurrer not being concluded on yesterday, the same is now resumed; and the argument not being concluded, the same is continued until tomorrow morning.

Which additional exception is as follows:

Comes said defendant, and, for further exception to said pretended grant from Miro to Filhiol, defendant says:

2. That it is not sealed with any official seal.

ROSE, HEMINGWAY AND ROSE,
J. W. HOUSE, *For Defendant.*

Filed April 23, 1895.

RALPH L. GOODRICH, *Clerk.*

On April 24, 1895, as follows:

Come the plaintiffs, by C. J. Boatner, E. W. Rector, and Dan. W. Jones and McCain, Esqrs., their attorneys, and comes the
60 defendant, by Rose, Hemingway and Rose, Esqrs., and Joseph W. House, Esqr., district attorney, its attorneys; and

the argument on the demurrer not being concluded on yesterday, the same is now resumed, and the court, having heard all the argument of counsel and not being well advised in the premises, takes time to consider of its judgment herein.

On June [illegible]1895, as follows:

Come the plaintiffs, by E. W. Rector, C. J. Boatner, and Dan. W. Jones and McCain, Esqrs., their attorneys, and comes the defendant, by Rose, Hemingway and Rose, Esqrs., its attorneys, and the court having considered the exceptions to the Exhibits A and B to the complaint herein, being the alleged grant of land by Estevan Miro to Jean Filhiol and the alleged survey of Carlos Trudeau, and the demurrer of the defendant to the complaint herein, it is now ordered and considered that the said exceptions and said demurrer both be sustained; to this ruling the plaintiffs excepted at the time and asked that their exceptions be noted of record, which is done, and, plaintiffs declining in open court to amend the said complaint, it is now ordered and considered that this suit be, and the same is, dismissed, and that defendant do have and recover of and from said plaintiffs all its costs in and about this suit expended, and the said plaintiffs file herein their writ of error and citation, which are allowed, sealed, and signed by the court, and also assignment of errors.

Which citation is as follows:

61 The United States of America to the Arlington Hotel Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division, eastern district of Arkansas, wherein Margaret A. Muse, Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bress, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hiplite Bres, Alberta D. Sanford, by her mother and next friend, Mary A. Dempsey; Frank C. Bres, Ferdinan A. Fenner, Blanche F. Power, Robert W. Fenner, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Charles C. Sanford, and Alice F. South, heirs-at-law of Don Juan Filhiol, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

The Seal of the Circuit Court. U. S. A., Western Division of East. Dist. Ark.

Witness the Honorable John A. Williams, judge of the district court, this 1st day of June, A. D. 1895.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

Service acknowledged this June 1st, 1895.

ROSE, HEMINGWAY & ROSE,
J. W. HOUSE, *For Defendant.*

62 The following map was used as an exhibit on the hearing of this case:

(Here follows map marked p. 63.)

64 Which assignment of errors is in words and figures following, to wit:

Circuit Court of the United States for the Eastern District of Arkansas, Western Division.

MARGARET A. MUSE, HYPOLITE FILHIOL, FRANCIS T. WATTS, Harriet L. Watkins, Hattie S. Burch, Roland M. Fi-hiol, Jerome Bres, Bermicide Bres, James L. Sanford, Julia M. Watts, Mary M. Watts, Hardy H. Filhiol, Hypolite Bres, Alberta D. Sandford, by Her Mother and Next Friend, Mary A. Dempsey; Frank C. Bres, Ferdinand H. Filhiol, Blanche F. Power, Robert W. Fenner, Lizzie S. Cochran, Robert R. Sandford, Alice F. South
against
ARLINGTON HOTEL COMPANY.

Assignment of Errors.

Come the said plaintiffs in error, by C. J. Boatner, E. W. Rector, Dan. W. Jones, and W. S. McCain, their attorneys, and say that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

1. That the court erred in sustaining the defendant's demurrer to the plaintiffs' complaint.

2. That the court erred in overruling the plaintiffs' motion to strike from the files the defendant's exceptions to the plaintiffs' documentary evidence of title.

3. That the court erred in sustaining the defendant's exceptions to the plaintiffs' documentary evidence of title marked Exhibit "A" to their complaint, the same being the grant of the one square league of land therein mentioned, of which the land in controversy in this action is a part, made by Estevan Miro, the governor
65 intendant of the province- of Louisiana and Florida West, inspector of troops, etc., to Don Juan Filhiol.

4. That the court erred in holding that said grant was not a perfect grant, but only an incomplete grant.

5. That the court erred in holding that said grant did not convey the title to one square league of land therein mentioned to the said Don Juan Filhiol.

6. That the court erred in holding that there was no seal to said grant.

7. That the court erred in holding that a seal was necessary to the validity of said grant.

8. That the court erred in holding that said grant should have been registered.

9. That the court erred in holding that said grant was not registered.

10. That the court erred in holding that said grant should have been recorded.

11. That the court erred in holding that said grant was not recorded.

12. That the court erred in holding that said grant was not made in accordance with the Spanish laws then in force in the province of Louisiana.

13. That the court erred in holding that the Spanish governor of the province of Louisiana could not grant said land in the manner mentioned to said documentary evidence of title.

14. That the court erred in holding that there was no survey of said square league of land made by Don Carlos Trudeau, surveyor general of the province of Louisiana.

15. That the court erred in holding that there was no procès verbal attached to a survey of said land made by Don Carlos
66 Trudeau as such surveyor general, describing it in such manner as to segregate it from the public domain.

16. That the court erred in holding that there was no figurative plan of said land made by said Don Carlos Trudeau as such surveyor general.

17. That the court erred in holding that plaintiffs in their complaint do not allege the loss of said survey, figurative plan, and procès verral.

18. That the court erred in holding that plaintiffs should have allowed the contents of the petition or memorial upon which Filhiol's grant was based.

19. That the court erred in sustaining defendant's exceptions to plaintiffs' documentary evidence of title marked Exhibit B to their complaint, the same being the certificate made by said Don Carlos Trudeau, as such surveyor general, that he had surveyed the league of land granted to Don Juan Filhiol as aforesaid, etc.

20. That the court erred in holding that Don Juan Filhiol was not put into possession of said land under said grant.

21. That the court erred in holding that Don Juan Filhiol was never in possession of said land under said grant.

22. That the court erred in holding that Don Juan Filhiol's title to the said land under said grant was not good unless he was put into actual pedal possession of it by livery of se-zin or by going upon it with an official of the Spanish government in the presence of witnesses, and going through such a ceremony as is described in the case of United States *vs.* Davenport, 15 Howard, 5.

23. That the court erred in holding that Don Juan Filhiol abandoned his title to said land.

67 24. That the court erred in sustaining defendant's exceptions to the plaintiffs' documentary evidence of title marked Exhibit C of the complaint, the same being the conveyance from said Don Juan Filhiol to Narcisso Bourgeat of the said square league of land.

25. That the court erred in sustain-ng defendant's exceptions to

plaintiffs' documentary evidence of title marked Exhibit D of their complaint, the same being the retrocession of said league of land by said Bourgeat to said Filhiol.

26. That the court erred in holding that it is of no importance to consider whether the deed from Filhiol to Bourgeat or the deed from Bourgeat to Filhiol describes the same land referred to in the said grant, and in holding that the title of the plaintiffs is not affected by those conveyances.

27. That the court erred in holding that the said grant to said Filhiol is not protected by the treaty between the United States and France of April 30, 1803.

28. That the court erred in assuming to find facts prejudicial to the plaintiffs, when only questions of law were involved.

29. That the court erred in holding that the plaintiffs' claim is barred under the act of Congress of May 28th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims."

30. That the court erred in holding that the plaintiffs' claim is barred by the act of Congress of June 11, 1870, known as the Hot Springs act.

31. That the court erred in holding that the defense of the statute of limitations can be raised by demurrer in the State of Arkansas.

32. That the court erred in holding that the Indians occupied the land in controversy at the time of said grant to Filhiol,
68 and that said grant did not take effect until that occupancy had ceased.

33. That the court erred in rendering judgment for the defendant.

Whereupon the said plaintiffs in error pray that the judgment of the circuit court of the United States for the eastern district of Arkansas, western division, be reversed, and that the cause be remanded to said circuit court, with instructions to overrule the demurrer and the exceptions to the plaintiffs' documentary evidence of title filed by the defendant, and to proceed to the trial of the case upon its merits.

C. J. BOATNER,
Of Monroe, La.,
E. W. RECTOR,
Of Hot Springs, Ark.,
DAN. W. JONES,
Of Little Rock, Ark.,
Attorneys for Plaintiff in Error.

Endorsed: Filed June 1st, 1895. Ralph L. Goodrich, clerk.

69 The following opinion was delivered by the court:

70 MARGARET A. MUSE *et al.*, Plaintiffs,
vs
THE ARLINGTON HOTEL COMPANY, Defendants.

This is an action of ejectment brought on the 25th day of July, 1894, by the plaintiffs, as heirs of Juan Filhiol, against the defendant, for a tract of land, including the hot springs, in the city of Hot Springs, in this State. The plaintiffs rely for title on certain documents, copies of which are filed with the complaint and are made exhibits hereto and which are as follows:

1. A paper, made Exhibit A, purporting to be a Spanish grant, translated from the Spanish language to the English in the following words:

"(From the land archives.)

The governor intendent of the provinces of Louisiana and Florida West, inspector of troops, etc.:

Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of this post of the Ouachita, of a tract of land of one square league, situated in the district of Arcansas, on the north side of the River Ouachita, at about two leagues and one-half distant from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of said surveyor, Trudeau, above named, and recognizing this mode of measurement, we approve of this survey, using the faculty which the King has placed in
71 us, and assign in his royal name unto the said Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

We give these presents under our own hand. Sealed with the seal of our arms and attested by the undersigned, secretary of His Majesty in this government, and intendents.

In New Orleans, on the 22nd of February, 1788.

ESTEVAN MIRO.

By mandate of His Excellence:

ANDRES LOPEZ ARMESTO."

"Registered."

2. A paper, purporting to be a survey, also translated from the Spanish language, marked Exhibit B, in the following words:

"Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency, Don Estevan Miro, brigadier of the R. ex. gob., intendent of the province of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land

of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters; and in conformity with the aforesaid order I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial, situated on the north side of Ouachita river, in the district of Arkansas, at about two leagues and a half distance from said river, to be verified by the figurative plan which accompanies, in conformity with — of the 6th of the present month of December, and of the current year 1788.

(Signed) CARLOS TRUDEAU."

72 Exhibit C to the complaint appears to be a deed from John Filhiol to Narcisso Bourgeat, conveying "a tract of land 84 arpents front and 42 in depth on each side of the stream called the Source of the Hot Springs, about two leagues from where it flows into the Ouachita river, having the Source of the Hot Springs as a center, the boundary lines on the east and west running parallel to their full depth, bounded on both sides by public lands, being the same property acquired by me from Stephan Miro, then governor of these provinces, under date of December 12th, 1787." This deed is not dated, but on it there is endorsed an acceptance of it, dated November 25th, 1803.

Then follows Exhibit D, which purports to be a retrocession by Narcisso Bourgeat to John Filhiol of "one league square, situated at the mouth of the Hot Springs creek, where it flows into the Ouachita, being the same property which he sold to me by act passed before Vincent Fernandez Texiero, then commandant of Ouachita post," dated July 17th, 1806, signed by Narcisso Bourgeat.

The defendant demurred to the complaint because:

1. It states no cause of action.

2. Because if plaintiffs have any remedy it must be pursued in equity and not at law.

The defendant also filed exceptions to the documentary evidence as follows:

"Comes said defendant and excepts to the so-called land grant, made an exhibit of evidence, marked Exhibit A to complaint, because:

1. The said instrument does not purport to be official or to come from any official depository.

73 And said defendant excepts also to the paper purporting to be a survey made by Don Carlos Trudeau, marked Exhibit B to the complaint, because:

1. It does not purport to be official.

2. It does not purport to come from any official depository.

3. Because it shows no such survey as is required by law to sustain the pretended Spanish grant set up in said complaint.

And the said defendant excepts to the instrument purporting to be a conveyance by John Filhiol, marked Exhibit C to said complaint, because:

1. The said deed does not purport to have been signed by the grantor therein.

2. Because the same does not describe the land set forth in the complaint herein.

3. The said deed does not purport to come from any official source or ever to have been filed in any office.

4. It is not authenticated as required by law.

The defendant also excepts to the instrument purporting to be a retrocession by Narcisso Bourgeat, a copy of which is marked Exhibit D to the complaint herein, because:

1. It is not authenticated in a manner required by law.

2. It does not purport to come from any official source.

3. It does not purport to come from any official depository of conveyances of lands.

4. It does not describe the lands mentioned in the complaint."

For plaintiffs, C. J. Boatner, E. W. Rector, Dan. W. Jones, & McCain.

For defendant, Rose, Hemmingway & Rose.

74 *Opinion of the Court by Hon. John A. Williams, District Judge.*

By the statute of Arkansas, the pleadings in the action of ejectment are very nearly assimilated to those of a suit in equity to quiet title. The pleading is special and not general. In his complaint the plaintiff must set forth "all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same, as far as the same can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy." H. & S. Dig., 2578.

All objections to exhibits must be made by exceptions to their admissability before the trial. *Id.*, 2572. The object of this statute is to prevent surprise to either party; also to prevent, as far as may be, the discussion of questions of evidence during the trial, so that trials may be rendered more expeditious and that the attention of juries may not be diverted from their exclusive province.

I do not find it necessary to notice the exceptions to the deed from Filhiol to Bourgeat or the subsequent deed from the latter to the former. In the view of the case that I have taken, it is of no importance to consider whether the deed from Filhiol to Bourgeat or the deed from Bourgeat to Filhiol describes the same land referred to in the alleged grant, as contended for by the plaintiffs; for if so, it is evident that the title of the plaintiffs is not affected by these conveyances, and that by the reconveyance Filhiol
75 could only have acquired the same title that he held in the first instance. As the stream cannot rise higher than its source and Filhiol could not grant any greater estate than he possessed, his title could not be improved by a conveyance to another and a reconveyance to himself.

It is, however, necessary to consider the exceptions to the alleged grant by Governor Miro and the alleged survey of Trudeau.

At the time that the alleged grant in this case was made the regula-

tions of Governor O'Reilly of February 18th, 1770, were in force in the province of Louisiana; the 12th section of which reads as follows:

"All grants shall be made in the name of the King by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the process verbal, which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor, to be annexed to the title of his grant." Copied also in United States *vs.* Boisdore, 11 Howard, 76; also in vol. V, American State Papers, pp. 289–'90.

These regulations were approved by the royal order of the King of Spain of August 24th, 1770, after which they had the force of statutes, which no official had the right to disregard. U. S. *vs.* Moore, 12 How., 217. The Spaniards "were a formal people, and their officials were usually careful in the administration of their
76 public affairs." White *vs.* U. S., 1 Wall., 680. Some degree of conformity with laws thus actually in force must be shown by the plaintiff: "Otherwise there can be no protection against imposition and fraud in these cases." U. S. *vs.* Teschmaker, 22 How., 405.

The applicant for a Spanish grant presented to the governor a petition or *requete*, as it was called, accompanied by what was called a "figurative" or "conjectural" map or plan of the land desired. This map was not made from an actual survey, but served to indicate in a general way the location of the land sought to be acquired, so that the officials might know whether it was vacant or not, and something of its real or prospective value. Without some such information the governor could not act advisedly in making or in refusing the grant. In all cases there was an actual survey on the ground before the title of the Crown was divested, followed by an actual putting the grantee in pedal possession, a proceeding which was the equivalent of delivery of seisin at common law, both ceremonies being derived from the feudal law. The figurative plan has sometimes been called a "chamber survey" (Hunnicutt *vs.* Peyton, 102 U. S., 361), because it was made in an office or other place remote from the land indicated. Scull *vs.* U. S., 98 U. S., 420. The grant upon this chamber survey delivered out for actual survey "meant not, as with us, a perfect title, but an incipient right, which, when surveyed, required confirmation by the governor." U. S. *vs.* Boisdore, 11 How., 99. Until an actual survey was made on the ground, the grant or concession was only a floating and unlocated claim. U. S. *vs.* Hanson, 16 Pet., 200. The actual survey consisted of "running lines with compass and chain, establishing
77 corners, marking trees and other objects on the ground, giving bearings and distances, and making field-notes and plats of the works. These are the ingredients of an actual survey."

Winter *vs.* U. S., Hempst., 362. Until actual survey made, no specific parcel of land was segregated from the public domain, and unless such a survey was made before the cession of Louisiana to the United States no title passed to Filhiol, his heirs or grantees. In U. S. *vs.* Lawton, 5 How., 26, the court, speaking on this subject, expressed the law as follows:

"It follows that the description when applied to the facts is too vague and indefinite for any survey to be made, and that therefore the claimants can take nothing under the concession, and that it is our duty to order the decree of the superior court of East Florida to be reversed and the petition to be dismissed.

We would remark, in addition, that this concession in its leading features cannot be distinguished from various others that have heretofore been brought before this court for adjudication, where no specific land was granted or intended to be granted, but it was left to the petitioner to have a survey made of the land in the district referred to by the concession by the surveyor general of the province, in due form, on the ground, and to cause the plat and certificate of such survey to be recorded by the surveyor general, by which additional public act the land granted was severed from the King's domain, but remained part of it until the survey was made and recorded. Until this was done, the warrant was a floating warrant of survey, not recognized by the government of Spain before the cession nor by this Government since, as conferring
78 an individual title to any specific parcel of land on the petitioner."

Such an inchoate claim as Filhiol possessed at the time of the cession was of no kind of validity as against the United States, and even if it had been expressly confirmed by act of Congress it would have derived its validity alone from that act "and not from any French or Spanish element which entered into its previous existence." Dent *vs.* Emmeger, 14 Wall., 312.

Though the land had been actually surveyed as required by the regulations of Governor O'Reilly, still the claim would have had no validity unless a copy of the survey had been filed in the office of the scrivener of the Government, as therein provided; "but the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed." Fremont *vs.* U. S., 17 How., 554. On this subject the Supreme Court say:

"This concession was an incomplete grant, and did not vest a perfect title to the property in the grantee, according to the Spanish usages and regulations, until a survey was made by the proper official authority and the party thus put in possession, together also with a compliance with other conditions, if contained in the grant or in any general regulations respecting the disposition of the public domain. Possession with definate and fixed boundaries was essential to enable him to procure from the proper Spanish authority a complete title." U. S. *vs.* Hughes, 13 How., 2; United States *vs.* Hansen, 16 Pet., 199.

If these are the rules to be applied where the grant in itself says nothing about a survey, they must have a more obvious application where the concession itself specifically requires such an actual
79 survey to be made and returned. The grant in this case expressly provides "that this land is to be measured so as to include the site or locality known by the name of Hot Waters." Not only was an actual survey on the ground required by the law, but the grant itself made such an actual survey a condition precedent to any investiture of title. The governor approved the "figurative" survey of Trudeau, but he, as was certainly meet and proper, required that the land referred to should be measured and identified by an actual survey which should leave nothing to conjecture.

No right, legal or equitable, vested in the petitioner until survey was made and returned according to law. "The original concession granted on his petition was a naked authority or permis ion and nothing more." Fremont *vs.* U. S., 17 How., 554; Peralta *vs.* U. S., 3 Wall., 440.

Not only was it necessary that the actual survey should be made, but it and the survey must have been returned and filed as provided in the regulations of O'Reilly; otherwise there was no valid grant. In the Peralta case, *supra*, the court said:

"Written documentary evidence, no matter how formal and complete or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed; but it may be said that the archives of the country may be lost or destroyed; and, if so, that the party in interest should not suffer. This is true, and if the claimant can show, to the satisfaction of the court, that the grant was made in conformity to law and recorded, and that the record of it has been lost or
80 destroyed, he will then be permitted to introduce secondary evidence of it; but the absence of record evidence is necessarily fatal unless that absence can be accounted for."

See also U. S. *vs.* Wiggins, 14 Pet., 350; U. S. *vs.* Kingsley, 12 Pet., 476; Chouteau *vs.* Moloney, 16 How., 234; U. S. *vs.* Cambuston, 20 How., 59; U. S. *vs.* Castro, 24 *id.*, 346; U. S. *vs.* Knight, 1 Black, 227; U. S. *vs.* Castillero, 2 Black, 163; Hornsby *vs.* U. S., 10 Wall., 224; U. S. *vs.* Power, 11 How., 577; U. S. *vs.* Pico, 22 How., 406; U. S. *vs.* Vallejo, *id.*, 416; U. S. *vs.* Bolton, 23 How., 341; U. S. *vs.* Vallejo, 1 Black, 541; U. S. *vs.* Sutter, 21 How., 175; U. S. *vs.* Hansen, 16 Pet., 199; Glenn *vs.* U. S., 13 How., 250.

In this case, as in De la Croix *vs.* Chamberlain, 12 Wheat., 601, the requirement mentioned in the grant being that there should be an actual survey, the title could in no event be perfected or completed until such survey was made and returned according to the provisions of the Spanish laws. See also Purvis *vs.* Harmonson, 4 La. Ann., 421. This survey could not "be done by conjecture; lines and corners must be established by the finding so as to close the survey." Denise *vs.* Ruggles, 16 How., 243; Hunnicutt *vs.* Peyton, 102 U. S., 359.

From a careful review of the authorities, which are numerous

and in perfect harmony, it is clear that the grant in this case "was not so separated by survey or by any such distinctive calls as will admit of a survey." U. S. *vs.* Miranda, 16 Pet., 153; U. S. *vs.* Boisdore, 11 How., 99.

The treaty between the United States and France concerning the cession of Louisiana to the United States, adopted April 30th, 1803, whereby the United States bound itself to protect the rights of the inhabitants of the province, has no application to merely
81 inchoate claims which were not binding on the governments of either Spain or France, but which existed only in entreaty. The treaty added nothing to the law of nations on the subject, and precisely the same rule has always been applied to inchoate entries made under the laws of the United States. Whitney *vs.* Frisbie, 9 Wall., 192; Yosemite Valley cases, 15 *id.*, 87; Shepley *vs.* Cowan, 91 U. S., 330; Hot Springs cases, 92 U. S., 713. So, the title of Filhiol being incomplete at the time of the cession, the treaty "imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law." U. S. *vs.* Miranda, 16 Pet., 153; U. S. *vs.* Hughes, 13 How., 2.

In this case there is no pretense that there was ever anything in any Spanish record that could show any compliance with the Spanish laws in respect of the grant in question. Therefore the grant must be held to be ineffectual to convey any title, legal or equitable. White *vs.* U. S., 1 Wall., 680.

The necessity of an inquiry as to whether the contemporary Spanish law has been conformed to is emphasized by consideration of the case of U. S. *vs.* King, 3 How., 773, where a suit was brought on a Spanish grant that had been forged, to the case of Sempeyrac *vs.* U. S., Hempst., 118, 7 Pet., 222, in which it was shown that one hundred and seventeen decrees rendered in the superior court of the Territory of Arkansas were set aside on bills of review because such decrees had all been based on forged grants and other cases growing out of similar frauds. At any rate, the questions now under consideration are all settled by decisions of the Supreme Court of the United States.

The grant under examination, without a subsequent actual survey on the ground, describes no land whatever that can be identified. "A tract of land of one square league" does not,
82 as a term of description, suggest any boundary whatever. The fact that the tract is described as "one league square" refers only to contents and not to shape. No one familiar with Spanish grants would infer that the tract was to be square. The map of the United States published under the direction of the Commissioner of the General Land Office purports to show in red colors all the Spanish and Mexican grants in our country. A glance at this map will disclose that such grants have been in all sorts of shapes, apparently at the will of the grantee; that only a few are *are* square or in the form of a parallelogram, and that hardly any of them are laid off with any special reference to the cardinal points of the compass.

A tract of land "about two leagues and one-half distant from said river Ouachita" is in the highest degree indefinite. The exact distance from the river is not mentioned, nor is there anything to indicate any point on the river to serve as a place of beginning. It seems to have been suggested that the hot springs should be regarded as the center of the tract, but no such inference can be drawn. Lecompte *vs.* U. S., 11 How., 125. It is a rule of "universal application in the construction of grants, which is essential to their validity, that the thing so granted should be so described as to be capable of being distinguished from other things of the same kind or be capable of being ascertained by extraneous testimony." Buyck *vs.* U. S., 15 Pet., 225. In that case it was said by the court that "it was not possible to locate any land, as no part was granted."

The court added that "the public domain cannot be granted by the courts." This rule has been frequently applied in other cases based on Spanish grants. Hunnicutt *vs.* Peyton, 102 U. S., 359; U. S. *vs.* Castillero, 2 Black, 20. In Villemont *vs.* U. S., 13
83 How., 267, the court said: "Nor is it possible to make a decree fixing any one side line or any one place of beginning for a specified tract of land." In Villalobos *vs.* U. S., 10 How., 556, the court said: "In cases of a vague description this court has uniformly held that no particular land was severed from the public domain by the grant, and that no survey could be ordered by the courts of justice."

In Scull *vs.* U. S., 98 U. S., 413, a map was attached to the figurative survey. A surveyor testified that from that map he could survey the land and mark out its metes and bounds, and claimed that he had made an accurate survey of the land claimed, but the court held that there was no valid grant. In U. S. *vs.* Boisdore, 11 How., 93, the claim was held to be void for the want of an actual survey. The court said that if the identity of the land could not be fixed, and it could not be ascertained that any specific tract was severed from the public domain by the grant at the time that Spain ceded Louisiana, "then the claim cannot be ripened into a complete title by our decree, as we only have power to adjudge what particular tract of land was granted. Our action is judicial. We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had and as Congress has."

See also U. S. *vs.* Delespine, 15 Pet., 319. In Buyck *vs.* U. S., 15 Pet., 225, the court said: "We apply to the case the laws and ordinances of the government under which the claims originated, and that rule, which must be of universal application in the construction of grants, which is essential to their validity, that the thing
84 granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony."

Only perfect titles were protected by the law of nations and by the treaty between France and the United States, and there could be no perfect title without an actual survey made previous to the cession of Louisiana. Dent *vs.* Emmeger, 14 Wall., 312. So indispensable was an accurate survey that it has often been held that decrees

confirming Spanish or Mexican grants under the various acts of Congress allowing confirmations were void is the grants and surveys would not enable the courts to ascertain the specific boundaries of the tracts referred to. Leboux *vs.* Black, 18 How., 473; Menard *vs.* Massey, 8 *id.*, 293; Snyder *vs.* Sickles, 98 U. S., 203; West *vs.* Cochran, 17 How., 403; Landes *vs.* Brent, 10 *id.*, 348; U. S. *vs.* Halleck, 1 Wall., 439. In Stanford *vs.* Taylor, 18 How., 412, the court said:

"The law is settled that where there is a specific tract of land confirmed according to ascertained boundaries the confirmee takes a title on which he may sue in ejectment. The case of Bissell *vs.* Penrose, 8 How., 317, lays down the true rule.

But where the claim has no certain limits and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land, nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department. The case of West *vs.* Cochran, 17 How., 403, need only be referred to as settling this point. And the question here is whether the concession to Perry is indefinite and vague and
85 subject to be located at different places.

It is to be forty by forty arpens in extent; it is to lie along the River Des Peres, from the north to the south, and to be bounded on the one side by the lands of Louis Robert and on the other by the domain of the King. On which side of Robert's land it is to lie we are not informed, further than that it is to lie along the river from north to south. The record shows that if surveyed west of Robert's tract the forty by forty arpens includes the River Des Peres, but if surveyed east of Robert's land it will not include the river. The uncertainty of outboundary in this instance is too manifies, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land."

86 To the same effect see Lafayette *vs.* Blanc, 13 La. Ann., 59.

In Arcenaux *vs.* Benoit, 21 *id.*, 673, the court said: "But where the claim has no certain limits and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land, nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department. The case of West *vs.* Cochran, 17 How., 403, need only be referred to as settling this point."

The whole doctrine is summed up in what was said by Miller, J., in the Scull case, *supra:* "The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise. There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow and find each line and its length, there must be such a description of natural objects for

boundaries that he can do the same thing *de novo*. The separation from the public domain must not be a new or conjectural separation with any element of discretion or uncertainty."

Nor does the certificate of the surveyor, Trudeau, help the matter. This merely recites a survey "to be verified by the accompanying figurative plan;" but a recital in a grant that prerequisites had been complied with is not sufficient ground for a presump-
87 tion that they have been observed. Fuentes *vs.* U. S., 22 How, 443. The certificate of survey in this case is of no probative value whatever. It refers to no landmarks, natural or artificial; gives no lines of boundary, no metes; identifies nothing. It adds not a ray of light to the grant itself. In U. S. *vs.* Castant, 12 How., 439, the boundaries were described by Trudeau "with great precision," and possession had been delivered by him to the grantee. Though the certificate of Trudeau in this case shows that he was directed by the governor in his grant to put Filhiol in possession of the land (which, however, is not true), it does not show that he had done so. The delivery of possession under the Spanish law was a formal and indispensable requisite. In U. S. *vs.* Davenport, 15 How., 5, it is shown how the ceremony was performed. The official went on the land in the presence of the grantee and of witnesses and took the grantee "by the right hand, walked with him a number of paces from north to south and the same from east to west, and he letting go his hand, the grantee walked about at pleasure on the said territory of La Nana, pulling up weeds, and made holes in the ground, planted posts, cut down bushes, took up clods of earth and threw them on the ground, and did many other things in token of the possession in which he had been placed, in the name of His Majesty, of said lands with the boundaries and extension as prayed for." Nothing of the sort seems to have been done in this case.

The certificate of Trudeau refers to the petition or memorial upon which Filhiol's grant was based and to an accompanying figurative plan. Neither of these is produced, nor is the loss of either shown, nor are the contents of either alleged. It is easy to account for the fact that Trudeau does not certify any
88 actual survey or any delivery of possession. In 1788 the nearest white settlements to the hot springs were insignificant and remote. The lands were occupied by the Indians. To reach them would require a journey of many days, involving privation and terror. The lands had then no commercial value, hence there was a total non-compliance with the regulations of O'Reilly. The Spanish laws prevailing at that time in the Territory of Louisiana in regard to the Indian tribes were far more humane than any laws that have ever existed in this country. 5 Am. St. Papers, 226, 232, 234. Yet it has always been held that the Indian right of occupancy in the United States was sacred until extinguished by cession to the Federal Government. U. S. *vs.* Cook, 19 Wall., 591; Leavenworth R. Co. *vs.* U. S., 92 U. S., 742; Cherokee Nation *vs.* Georgia, 5 Pet., 1. So all Spanish grants "were made subject to the rights of Indian occupancy. They did not take effect until

that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it." Chouteau *vs.* Maloney, 10 How., 239. Hence it is easy to account for the fact that in this case there was no survey and no delivery of possession.

The Indian title to the lands in controversy was not extinguished until the year 1818. At that time the pretended title of Filhiol had long since lapsed, because it was not possible to perfect it after the cession of Louisiana. The grant imposed "upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law." U. S. *vs.* Miranda, 16 Pet., 153. "No survey of the land was ever made; the duty imposed upon the grantee to produce the plat and demarcation
89 in proper time was never performed. This was a condition he assumed upon himself. The execution and return of the survey to the proper office in such case could only sever the land granted from the public domain. No particular land having been severed from the public domain, * * * his was the familiar case of one having a claim on a large section of the county unlocated. * * * In grants of land with uncertain designations, to be made on a large district of country, they must have been severed from the public domain by survey or be void for want of identity." *Id.*, Carondelet *vs.* St. Louis, 1 Black, 179. In Scull *vs.* U. S., 98 U. S., 419, it was held that in suits brought to enforce rights growing out of Spanish claims the plaintiff must show "a title completed under the foreign governments, evidenced by written grant, actual survey, or investiture of possession."

See also U. S. *vs.* Hughes, 13 How., 1; U. S. *vs.* Boisdore, 11 How., 92.

Not only must there have been an actual survey by metes and bounds, but the grant itself, "with the memorials and other papers, whatsoever they might be, which had induced the governor to make the grant," must have been registered in the land office. Chouteau *vs.* Maloney, 16 How., 346. This rule is necessary so "as to make the antedating of any given grant irreconcilable with the proof. Otherwise there can be no protection against imposition and fraud in these cases." U. S. *vs.* Teschmaker, 22 How., 405; U. S. *vs.* Bolton, 23 How., 341; U. S. *vs.* Pico, 22 *id.*, 406; U. S. *vs.* Power, 11 *id.*, 577; U. S. *vs.* Ballejo, 22 *id.*, 416. The same doctrine has been applied to floating claims arising under the New Madrid acts. Hot Springs cases, 92 U. S., 713, and cases there cited. In Fremont *vs.* U. S., 17 How., 554, the court, in
90 speaking of Spanish grants, said:

"These grants were almost uniformly made upon condition of settlement or some other improvement by which the interests of the colony, it was supposed, would be promoted; but until the survey was made no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission and nothing more: but when he had incurred the expense and trouble of the survey under the assurances contained in the concession he had a just and equitable claim to

the land thus marked out by lines subject to the conditions upon which he had originally asked for the grant; but the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed, for he had paid nothing and done nothing which gave him a claim upon the conscience and good faith of the Government."

In order to avoid the force of these numerous cases learned counsel for plaintiffs favored the court during the argument with plats purporting to indicate the land granted. These were made either by themselves or at their instance. They could only, at best, duplicate the plan or map to which Trudeau refers in his certificate and which is not produced. For this effect they are not even persuasive in the most remote degree. They are based on four assumptions—first, that the hot springs are to be taken as the center of the tract; second, that the lines of the tract must have been contemplated as running east and west and north and south; third, that the tract must have been intended to be laid off in a square, and,
91 fourth, that Trudeau must have intended to lay off the tract and did lay it off as thus indicated. Thus we have a conjectural reproduction of what was only a figurative survey. This is piling conjecture upon conjecture, neither of which is supported by any presumption of law or fact. It is needless to say that such vague speculations cannot be used as muniments of title.

We are referred by counsel for plaintiffs to Strother *vs.* Lucas, 12 Pet., 438, where the court say: "He who would controvert a grant executed by the lawful authority with all the solemnities required by law takes on himself the burden of showing that the officer has transcended the powers conferred upon him or that the transaction is tainted with fraud;" but in this case there is no showing that the acts required by law to be performed, viz., the making of an actual survey on the ground, the certification and approval of the same, the delivery of possession, were ever performed at all.

For the reasons stated the court is of opinion that the grant and survey pleaded by the plaintiff are not admissible in evidence in this cause, and hence the exceptions to them are sustained.

We are now called upon to consider the sufficiency of the demurrer to the complaint. Does the complaint state a *prima facie* cause of action? "When a complaint fails to state a fact which is essential to the cause of action, objection to it should be taken by demurrer." Flagg *vs.* Martin, 53 Ark., 453; Wilson *vs.* Spring, 38 Ark., 181.

The court is of the opinion that the demurrer should be sustained for the following reasons:

92 1. The claim is barred under the act of Congress of May 26th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims." 4 Stat. at Large, 52. This act permitted all persons claiming under French and Spanish grants to file petitions in various courts therein designated in order to have their titles confirmed. The 5th section is as follows:

"And be it further enacted that any claim to lands, tenements, or hereditaments within the purview of this act which shall not be brought by petition before the said courts within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and (in) equity, and no other action, at common law or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to said claims."

In respect hereof our attention is invited by counsel for the plaintiffs to the case of U. S. — Percheman, 7 Pet., 90. But in that case the commissioners had no power save to report to Congress. They were not, as the court declared, "a court exercising judicial power and deciding finally on titles."

This act was several times extended, the last time for five years by act of June 17th, 1844. 5 Stats. at Large, 676.

It does not appear from the complaint that Filhiol or any of his heirs or grantees ever complied with the terms of this act. But counsel for plaintiffs say that the act in question can have
93 no application to perfect titles. Conceding that to be so, we cannot find that the claim sued upon was at any time a perfect title. In fact it lacked almost every essential element of perfection. We can only use the words of the Supreme Court:

"Claimant calls this a grant, and it is his privilege to do so, but it is in vain for him to expect that this court can give its sanction to any such manifest error." U. S. *vs.* Castillero, 2 Black, 163.

2. The claim is barred by the act of Congress known as the Hot Springs act.

Under the provision of the act of June 11, 1870 (16 Stat., 149), all persons claiming title, either legal or equitable, "to the whole or any part of the four sections of land constituting what is known as the Hot Springs reservation, in Hot Springs county, in the State of Arkansas," had an opportunity to institute suit, in the nature of a bill in equity, against the United States, in the Court of Claims, "and prosecute to final decision any suit that may be necessary to settle the same: Provided that no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall be not brought under the provision of this act within that time shall be forever barred."

No valid reason can be shown why this statute did not apply to the Filhiol claim as well as to other claims. There is an alleged loss of the grant and survey, but that would not suspend or change the effect of the statute. In no case is the running of a statute of limitation suspended by causes not mentioned in the act
94 itself. Braun *vs.* Sauerwein, 10 Wall., 218; Montgomery *vs.* Hernandez, 12 Wheat., 129; Erwin *vs.* Turner, 6 Ark., 14; State Bank *vs.* Morris, 13 *id.*, 291; Pryor *vs.* Ryburn, 16 *id.*, 671; Smith *vs.* Macon, 20 *id.*, 18; R'y Co. *vs.* B'Shears, 59 *id.*, 244.

3. After so great a lapse of time the claim, if originally valid, must be considered as having been abandoned. In U. S. *vs.* Hughes,

13 How., 3, a delay of forty years to bring suit to enforce a Spanish claim was held to be fatal. In U. S. *vs.* Philadelphia, 11 How., 652, a delay of forty years was held to be a constructive abandonment. In Fuentes *vs.* U. S., 22 How., 460, the court came to the same conclusion, though the delay could not have been for more than fifty years. In U. S. *vs.* Repentigny, 5 Wall., 211, an abandonment was presumed from a delay to bring suit for more than a hundred years, during which time the claimants had been in possession for more than four years. In U. S. *vs.* Moore, 12 How., 222, the same presumption was raised where the plaintiffs had delayed to sue for nearly fifty years. In Valliere *vs.* U. S., Hempst., 338, the same presumption was indulged where the delay was for more than fifty years.

It does indeed appear that the heirs of Filhiol brought a suit for confirmation in the name of James Ball as assignee in the superior court of Arkansas Territory, under the act of May 26th, 1824, which was pending at the time that the various suits on the forged grants mentioned in Sampeyrac *vs.* U. S., *supra*, were also pending; that a question of forgery in the Ball case was also raised, and that on a rule being made by the court for the production of the original papers and on non-compliance therewith the suit was dis-
95 missed (Frauds in Land Titles in Arkansas, 5 Am. State Papers, 365, 364, 366, 430, 338); but this is certainly no adequate showing of diligence. The American State Papers, having been published under authority of law, are evidence of whatever they contain. Watkins *vs.* Coleman, 16 Pet., 50, 55; Bryan *vs.* Forsyth, 19 How., 334.

I could not but be more or less impressed in passing on the exceptions with the circumstances that both the survey and the grant are apparently written by the same hand on the same kind of paper and with the same ink; that both contain words badly spelled and ungrammatical phrases, showing that they were gotten up by illiterate persons, and that though the grant purports to be attested by the armorial seal of the governor, yet there is no impression of a seal of any kind, but merely a seal of wax, evidently made to adhere to the paper by the application of some smooth surface.

It is said by counsel for plaintiffs that by the Spanish law no seal was required to such a grant as this, and that a flourish at the end of the signature, such as appears in this instance, might be used instead. Conceding this to be so, it is still singular that the grant should explicitly state that it was "sealed with the seal of our arms," and that a blank seal should be attached.

The alleged long loss of the papers "artistically described in the testimony," as was said in a case growing out of a like grant (in U. S. *vs.* Castillero, 2 Black, 185), seemed also to be a suspicious circumstance. In U. S. *vs.* Vallejo, 1 Black, 541, it was held that "a false note of the attesting secretary at the bottom of the grant that it had been registered is a serious objection to the claim
96 under it." A like note appears at the bottom of the grant in this case, though there is no pretense that the grant was ever registered.

It would be a mere affectation to pretend that thoughts of this kind, growing out of the well-known history of Spanish claims in Arkansas, have not intruded themselves on the mind of the court. Indeed, they have a certain bearing on the point under consideration, for they afford some very plausible reasons to account for the long delay of the claimants in asserting their rights in the courts, some reason why they twice at an interval of several years importuned Congress for special legislation which might seem to be some sort of a recognition of the validity or at least of the merits of their claim; reasons why they should have brought a tentative suit in the Court of Claims for rents on these lands, and why eventually, after the lapse of so long a time, after the death of all witnesses who knew anything about the matters in dispute, final resort should be had to this court. But, though this view of the case has been pressed in argument, the court does not find it necessary to do more than advert to it for the sole purpose of vindicating the principles of law involved in this controversy, the expression of the collective wisdom and foresight of generations, which renders success in cases of this sort hopeless.

It must also be conceded that the present suit makes no appeal to our sense of justice. As shown by the facts alleged in the complaint, Juan Filhiol never paid anything for the land sued for. He never paid even the trivial fee necessary to be paid in order to have his grant registered. He never complied with the terms of the grant or with the requirements of the laws in force at the time that,
97 as alleged, the lands were donated to him. The taxes that have accrued on the property covered by the grant during so many years, with accrued interest, must amount to a very large sum, of which it is extremely improbable that the plaintiffs have paid anything.

In 1788 the hot springs were upon lands occupied and owned by a tribe of Indians, and were far from any European settlement. They were in the midst of an unbroken wilderness, and they could be reached from such places as New Orleans or St. Louis only after many days of arduous travel through a country where there were only rude Indian trails instead of roads. Such a journey would have been attended by perils and by every kind of discomfort. It could only be made by men in robust health and in the full vigor of life. Before the application of steam to navigation our watercourses would have impeded rather than assisted the traveller. The country had but few white inhabitants. New Orleans was only a small town, and St. Louis was an obscure village on the extreme margin of the vast and unexplored wilderness stretching from the Mississippi river to the Pacific. Only De Soto, in 1541, and a few later explorers of the white race had ever seen the springs. Their medicinal qualities a hundred and six years ago were unknown, but having been ascertained after the cession in 1818, the United States Government bought up the title of the Indians. In 1832, recognizing the great importance of the springs to the general public, it reserved the property from entry and sale forever, and for their use it now holds it in trust, if not in deed, for the heirs

of Filhiol. In the meantime, before the commencement of this suit, a thriving and prosperous city had been built up around the springs. The Federal Government had spent large sums for
98 hospitals and in improving and beautifying its property. By the joint labor and money of private citizens, the municipality, and the Federal Government, streets had been laid our, parks had been established, churches and school-houses had been erected, and railway connections with the rest of the continent had been created. In hotels alone provision had been made for guests and for the travelling public at an expense of millions of dollars. Many of the citizens and others have made these investments largely because they supposed that the springs themselves would be perpetually under the control of the Federal Government and would be managed with its usual fairness and generosity. If they should be decreed to be private property, the event would simply be a public and private calamity of incalculable magnitude. They would become an unending monopoly, their control the subject-matter for greed, avarice, selfishness, extortion, and all the whims and caprices of private individuals, under no responsibilty to the public; owners who might, if they thought fit, wholly exclude others from the healing waters or impose such conditions upon access to them as would be intolerable. The plaintiffs, however, after so long a delay, during which time they have never spent a cent in the great work of making these many enduring and costly improvements, now ask that they may reap where they have not sown. But it has often been held that if one sees another making costly improvements on his lands, believing them to be his own, without any assertion of title, he will be estopped from claiming an adverse title. Erwin *vs.* Lowry, 7 How., 172; Kirk *vs.* Hamilton, 102 U. S., 68; Close *vs.* Glenwood Cemetery, 107, *id.*, 466; Jowers *vs.* Phelps, 33 Ark., 465. No stronger case than the present as coming within this principle is likely to occur.

99 On the ground stated the demurrer to the complaint is sustained, and an order will be entered that, unless the plaintiffs amend within thirty days from this date, this suit shall be dismissed.

100 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in case of Margaret A. Muse *et al. vs.* Arlington Hotel Company.

The Seal of the Circuit Court, U. S. A., Western Division of East. Dist. Ark.

In witness whereof I have hereunto set my hand and the seal of said court this 13th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

Attest: RALPH L. GOODRICH, *Clerk.*

101 U. M. Rose. W. E. Hemingway. G. B. Rose.

Rose, Hemingway & Rose, attorneys-at-law, 314 West Markham street.

LITTLE ROCK, ARK., —— —, 189–.

In the Supreme Court of the United States.

MARGARETE A. MUSE *et al.*, Plaintiffs in Error,
v.
ARLINGTON HOTEL CO., Defendant.

It is hereby stipulated that in printing the transcript in this cause the photographs included in the record shall be omitted.

This Dec. 9, 1895.

E. W. RECTOR,
DAN. W. JONES,
W. S. McCAIN,
C. J. BOATNER,
For Plaintiff- in Error.
U. M. ROSE,
G. B. ROSE,
For Defendant in Error.

102 [Endorsed:] Case No. 16,031. Supreme Court U. S., October term, 1895. Term No., 741. Margaret A. Muse *et al.*, P. E., *vs.* Arlington Hotel Company. Stipulation to omit photographs from record in printing. Filed Dec. 12, '95.

103 Know all men by these presents that we, Margaret A. Muse *et al.*, as principals, and S. L. Crissey and Alex. R. Mullowny, as sureties, are held and firmly bound unto the Arlington Hotel Company in the full and just sum of five hundred dollars, to be paid to the said The Arlington Hotel Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a circuit court of the United States for the eastern district of Arkansas, in a suit depending in said court

between Margaret A. Muse *et al.*, plaintiffs, and The Arlington Hotel Company, defendant, a judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said writ to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) S. L. CRISSEY. [SEAL.]
(Signed) A. R. MULLOWNY. [SEAL.]

Sealed and delivered in presence of—
(Signed) DANIEL WILLIAMS.
(Signed) CHARLES B. ELLIOTT.

In pursuance of the order of court of March 16, 1896.
Approved by—
(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

17th March, 1896.

104 WASHINGTON CITY, } ss:
District of Columbia, }

This 27th day of December personally appeared before me, Joseph Harper, a notary public in and for the District aforesaid, S. L. Crissey and A. R. Mullowny, who, being first duly sworn according to law, depose and say that they are each worth the sum of five hundred dollars in property subject to execution over and above all their debts, liabilities, and exemptions.

(Signed) S. L. CRISSEY.
(Signed) A. R. MULLOWNY.

Subscribed and sworn to before me this 27th day of December, 1895.

[SEAL.] (Signed) JOSEPH HARPER,
Notary Public.

DISTRICT OF COLUMBIA, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, the same being a court of record, do hereby certify that Joseph Harper, Esq., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said District, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgments and proofs of deeds or conveyances for land,

tenements, or hereditaments, and administer oaths in said District; and, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Washington, D. C., [SEAL.] the 27th day of December, A. D. 1895.

(Signed) J. R. YOUNG, *Clerk*,
(Signed) By M. A. CLANCY.
Assistant Clerk.

105 [Endorsed:] Case No. 16,031. Supreme Court U. S., October term, 1895. Term No., 741. Margaret A. Muse *et al.*, P. E., *vs.* The Arlington Hotel Co. Writ of error bond. Filed March 17, 1896.

Endorsed on cover: Case No. 16,031. E. Arkansas C. C. U. S. Term No., 341. Margaret A. Muse, Hippolite Filhiol, Francis J. Watts, *et al.*, plaintiffs in error, *vs.* The Arlington Hotel Company. Filed September 24th, 1895.

No. 741 Sept Sq.

Brief of Rose and Rose for D. E. C.

Filed Feb. 10, 1896.

741

In the Supreme Court of the United States.

MARGARETE A. MUSE, Plaintiff in Error.

v.

THE ARLINGTON HOTEL CO., Defendant in Error.

Brief for Defendant on Motion to Dismiss.

In the way of compliance with rule 6, nothing further is necessary than to refer to section 1,000 of the Revised Statutes of the United States referred to in the motion.

Respectfully,

U. M. Rose,

G. B. Rose,

For Defendant in Error.

No. 341 Exhibit 59.

Brief of Rose & Rose for D. E.

Filed Apr. 17, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

MARGARET A. MUSE ET AL., *Plaintiffs in Error,*

v. **No. 341.**

ARLINGTON HOTEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Brief for Defendant on Motion to Dismiss or Affirm.

Ejectment on a pretended Spanish grant dating from 1788. Complaint dismissed on demurrer because it showed no cause of action. Plaintiffs sued out a writ of error to *this court*.

The pending motion is to dismiss the writ of error for want of jurisdiction in this court; or else to affirm because of the frivolous character of the matters presented for consideration.

I.

The only possible ground of jurisdiction in this case is to be found in the fifth subdivision of section 5 of the Appellate Courts Act:

"In any case in which * * * the *validity* or construction of any treaty made under its authority is drawn in question."

Neither the validity or the construction of the treaty of cession of the Territory of Louisiana was involved in the decision below; which was to the effect that the title of the plaintiffs failed on account of noncompliance with Spanish laws.

Gill *v.* Oliver, 11 How., 529.

The treaty was before the court "as a fact only, and not for the purpose of construction."

Williams *v.* Oliver, 12 How., 122.

Millingar *v.* Hartupee, 6 Wall, 259.

Baltimore R. Co. *v.* Hopkins, 130 U. S., 225.

U. S. *v.* Lynch, 137 id., 280.

South Carolina *v.* Seymour, 153 id., 353.

II.

On the proposition to affirm it may not be amiss to quote the Arkansas statute relative to proceedings in ejectment.

"Sec. 2578. In all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies

for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, *and shall state such facts as shall show a prima facie title in himself to the land in controversy*, and the defendant in his answer shall plead in the same manner as above required from the plaintiff.

"Sec. 2579. The defendant in his answer shall set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiff shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial, unless the defect for which the exception is taken shall be cured by amendment.

"Sec. 2580. All objections to such evidences not specifically pointed out in the manner provided above shall be waived.

"Sec. 2581. To entitle the plaintiff to recover, it shall be sufficient for him to show that at the time of the commencement of the action, the defendant was in possession of the premises claimed, and that the plaintiff had title thereto, or had the right to the possession thereof."

Digest of Statutes, 1894.

The proceeding is thus assimilated to a suit in chancery to quiet title, the parties being required to play with an open hand.

The plaintiffs relied solely on a paper title; and, as that showed no right in them, the complaint was subject to demurrer.

Fagg *v.* Martin, 53 Ark., 453.

A full account of this claim, and of others of the same sort, will be found in a letter of Isaac T. Preston, 5 Am. State Papers, 338.

This may properly be referred to.

Watkins *v.* Holman, 16 Pet., 50.

Bryan *v.* Forsyth, 19 How., 334.

The opinion of the court below does not profess to be exhaustive; but it suffices; and no additional suggestions seem to be needed in order to show the preposterous anachronism of this aged and more than secular claim.

True the papers are said to have been lost for some time in an old trunk, where they seemed to rest in a state of suspended animation; but such incidents appear to be customary in cases of this sort.

U. S. *v.* Castillero, 2 Black, 185.

Respectfully,

U. M. Rose,

W. E. Hemingway,

G. B. Rose,

For Defendant in Error.

MARGARET S. MUSE, HIPPOLYTE FILBIOL, et al.,
Plaintiffs in Error,

vs.

THE ARLINGTON HOTEL COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. G. CARLISLE,
LOGAN CARLISLE,
For Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

MARGARET A. MUSE, HIPPOLITE FILHIOL, *et al*,
Plaintiffs in Error,
vs.
THE ARLINGTON HOTEL COMPANY,
Defendant in Error.

No. 59.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This case comes up on a writ of error from the United States District Court for the Eastern District of Arkansas, Western Division, and it seeks the reversal of a judgment sustaining a demurrer to plaintiffs' complaint and amended complaint, and, also, defendant's exceptions to the documentary evidences of title on which plaintiffs gave notice they would rely on the trial of the suit.

Plaintiffs in error filed their original complaint in ejectment July 25, 1894 (Record, p. 2), to which defendant demurred (Record, p. 7). Thereafter, the defendant moved the court to require plaintiffs to file the originals of the documents exhibited with their complaint (Record, p. 8), and, later, filed certain exceptions to these exhibits (Record, p. 8). Plaintiffs were allowed fifteen days within which to file such originals (Record, p. 8), and, thereafter, filed certain photographs and certified

copies of them (Record, p. 9), which photographs, by stipulation, are omitted from the printed record; but the original documents will be produced on the hearing.

Plaintiffs offered (Record, p. 9) to file a motion to strike defendant's exceptions from the files, but this motion was overruled, to which plaintiffs excepted (Record, pp. 9–10).

Pending the demurrer, plaintiffs filed an amended complaint (Record, pp. 9–10), in which they say that defendant is a corporation organized under the laws of Askansas and doing business in the city of Hot Springs, in that State; that, except Alice F. South, who is a citizen and resident of Coahuila, Mexico, they are all citizens and residents of the United States, some of Louisiana, some of Texas, some of Mississippi, and the other of Illinois; that they are the only heirs at law of Don Juan Filhiol, who died intestate, a citizen of the territory of Louisiana, in 1821, and that they are the owners in fee of the league of land described in the amended complaint.

They allege that their ancestor, the said Filhiol, was born in France in 1740, and that he left that country in 1763, going to San Domingo, whence he went to Philadelphia, in 1779, expecting to return with the Count D'Estaing to France, but that he changed his destination, and arrived in New Orleans in May, 1779, where he joined the volunteers in the war between Spain and England; that, in 1783, he was appointed by the King of Spain captain of the army and commandant of the militia, and assigned to duty at the post of Ouachita, in the province of Louisiana, under instructions from Don Estevan Miro, governor-general of the province.

They allege that, on December 12, 1787, said Filhiol memorialized the governor of Louisiana and West Florida for a grant of land, and that the governor ordered a survey of the land for which he applied, and that, before February 22, 1788, Don Carlos Trudeau, surveyor-general of Louisiana, made a survey of the same in accordance with the law as it then existed, and made a report of the survey, with a figurative

plan and procès verbal in due form, in and by which the land was described as follows: A tract of land with a front of 84 arpents and a depth of 42 arpents on each side of the stream called "La Source d'eau Chaude," about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by lands belonging to the Crown. They say that the survey, figurative plan and procès verbal have been lost or destroyed and that they cannot produce them, and they allege that, on February 22, 1788, the said Miro, as governor, made and delivered to said Filhiol, a grant of one league of land, the description of which appears in the amended complaint.

They say that said grant was made while said Filhiol was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity as such commandant; that the said Miro, as governor, was, by the Spanish colonial laws, vested with power to make grants of land and convey by such grants the absolute fee simple to the lands granted.

It is alleged that the land granted by Miro to Filhiol consisted of a certain one square league with the Hot Springs, at the city of Hot Springs, as its center, the description, metes and bounds of which are more accurately measured and described in the survey, figurative plan and procès verbal; and that the grant is in the Spanish language, but that, translated into English, it is as follows:

FROM THE LAND ARCHIVES.

The governor and intendent of the provinces of Louisiana and Florida West and inspector of troops, etc.:

Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of the post of Ouachita,

of a tract of land of one square league, situated in the district of Arcansas on the north side of River Ouachita, at about two leagues and a half distance from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve those surveys, using the faculty which the King has vested in us, and assign in his royal name unto the said Julian Filhiol the said league of land in order that he may dispose of the same and of the usufruct thereof as his own.

We give these presents under our own hand, sealed with the seal of our arms and attested by the undersigned secretary of His Majesty in this government and intendence.

28 In New Orleans, on the 22nd day of February, 1788.

(Signed) ESTEVAN MIRO.

By mandate of His Excellency:

(Signed) ANDRES LOPEZ ARMESTO.

Registered. (Record, p. 12.)

They say that, after the delivery of this grant to Filhiol, and on December 6, 1788, Carlos Trudeau, land and particular surveyor of Louisiana, made, executed and delivered to the grantee a certificate of measurement of said land, a translation of which they set forth, as follows:

Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estevan Miro, brigadier of the R. ex. gob., intendent of the province of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give

possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies in conformity with * * * of the 6th of the present month of December and of the current year 1788.

(Signed) CARLOS TRUDEAU.

(Record, p. 13)

Plaintiffs allege that the making and delivery of this certificate was a delivery of the judicial possession of the land and had the force and effect of segregating the land from the public domain, and, with the grant, vested full and complete title in the grantee.

They further allege that Filhiol sold and conveyed this land, on November 25, 1803, to his son-in-law, Narcisso Bourgeat, passing the deed before Don Vinciente Fernandez Fegevio, lieutenant of the regiment of infantry of Louisiana and military and civil commandant of the district and jurisdiction of Ouachita, the deed being witnessed by Señor Baron de Bastrop, and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all whom were principal men at Ouachita at that time. Translations of this deed and a deed from Bourgeat reconveying the land to Filhiol, dated July 17, 1806, and passed before J. Poydras, judge of the Parish of Pointe Coupee, are filed with the pleading—Record, 13, 14, 15.

They say that the deed was immediately reported to the proper office of the province of Louisiana and was afterwards duly recorded. Copies of this deed and of the deed of retrocession from Bourgeat to Filhiol, the former in Spanish, and the

latter in French, properly certified by the officers in charge of them, are exhibited with the amended complaint, the originals being kept on file as required by law, and the allegations are made that Bourgeat retroceded the land to Filhiol by deed passed before J. Poydras, judge of the court of the Parish of Pointe Coupee, July 17, 1806, and that Filhiol never afterwards parted with his title.

Plaintiffs allege that when said deeds were made, the Spanish colonial law forbade any public officer, having authority to receive acknowledgements of and pass deeds for the conveyance of lands, to pass such deeds or to receive acknowledgements thereof, unless they knew that vender had a title to the lands proposed to be sold.

They further say, that, in 1819, the said Filhiol leased the Hot Springs to one Dr. Stephen P. Wilson for five years; that shortly thereafter, in 1821, said Filhiol died, and that, ever since his death, the plaintiffs have always urged their title to the property and employed agents and attorneys to do so for them, but that, during a large part of this time, they have been embarrassed by the want of the original grant, which had, without their knowledge, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and after whose death, in 1843, the grant was mislaid; that often and repeated searches were made by them, but without success, but that lately, in 1883, the grant was found by Mrs. Matilda E. Moore, of New Orleans Parish, Louisiana, among the effects of her mother, the widow of the said Bowie, and that the grant was, in that year, delivered by Mrs. Moore to Margaret A. Muse, one of the plaintiffs, who is the daughter of the said Bourgeat and Marie Barbe Filhiol and a granddaughter of the grantee. Printed copies of affidavits made by Matilda E. Moore, Ellen M. Coates, Margaret Adelaide Muse, and Hypolite Filhiol, as to the finding and delivery of the grant and Trudeau's certificate, are attached to and filed with the amended complaint.

Plaintiffs state that they claim title to the said league of land as the heirs at law of Filhiol, and that they rely upon the written evidences of their title filed with their complaint.

It is alleged, that the defendant is in the unlawful possession of a part of the land, which part is included in the Hot Springs Mountain reservation, in the city of Hot Springs, county of Garland, and State of Arkansas, the boundary lines of which reservation were established by the Hot Springs commission, by public surveys, in pursuance of the laws of the United States, the lands so unlawfully possessed being described as follows, to wit:

"Commencing at the quarter-section corner between sections thirty-two and thirty-three, in township two south, range nineteen west, of the fifth principal meridian, in the city of Hot Springs, county of Garland, and State of Arkansas, and run thence north seventy-seven degrees and thirty minutes east four hundred and thirty-seven feet to a stone monument known as angle No. 33 of said Hot Springs Mountain reservation; thence along the line of said reservation, between angles 33 and 34 thereof, fifteen feet to the point of beginning; thence south five degrees east three hundred and twenty-two feet; thence north eighty-five degrees east seventy-six feet; thence north five degrees west ninety-nine and eighth-tenths feet; thence north eighty-five degrees east sixty feet; thence north five degrees west fifty-seven feet; thence south eighty-five degrees west seventy-six feet; thence north five degrees west fifteen and eight-tenths feet; thence north eighty-five degrees east twenty-nine feet; thence north five degrees west eighty-seven and eight-tenths feet; thence south eighty-five degrees west thirty feet; thence north five degrees west twenty feet; thence north eighty-five degrees east one hundred and seventy-four and seven-tenths feet; thence north five degrees west fifty-three feet; thence south eighty-five degrees west forty-eight feet; thence north five degrees west eighty feet; thence north

eighty-five degrees east fifty-four feet; thence north five degrees west one hundred feet to a point between angles numbering 33 and 34 of said Hot Springs Mountain reservation three hundred and twenty-nine and seven-tenths feet from said angle No. 33; thence along said reservation line south westward one hundred and thirty-eight and seven-tenths
36 feet; thence south five degrees east one hundred and six feet; thence one hundred and thirty feet south eighty-five degrees west to the point of beginning, all courses being magnetic" (Record, p. 17).

They allege that defendant has been in such possession since the third day of March, 1892, during all which time plaintiffs say that they have had title to and right of possession of said land; and they say that, by reason of such possession, they have been damaged in the sum of twenty thousand dollars.

They pray judgment for the possession of the land so held, and for damages for the unlawful detention.

To this amended complaint the defendant demurred (Record, pp. 9–10, 25). Thereafter, pending the demurrer, it filed its answer (Record, p. 26), and, later, filed an additional exception to the grant from Miro to Filhiol (Record, p. 30).

The grounds of the demurrer were, that the amended complaint did not state facts sufficient to constitute a cause of action, and that, if plaintiffs have any remedy, it must be pursued in equity and not at law.

Afterwards, on June 1, 1895, the court rendered its judgment, sustaining the demurrer and the exceptions to the grant and the survey, being exhibits A and B to the complaint, and dismissing the complaint with costs; to this ruling plaintiffs excepted, and sued out a writ of error with assignment of errors (Record, p. 31).

Argument.

The record contains an assignment of errors setting out separately and particularly each error asserted, but, for the

purposes of the argument, they may be condensed into three propositions.

1. It was error to permit the defendant in error to file exceptions to the exhibits, otherwise than with the answer.

2. It was error to sustain said exceptions, or any of them, pending a demurrer.

3. It was error to sustain the demurrer and give judgment dismissing the action.

The statute of Arkansas regulating the pleadings and practice in actions for the recovery of land was passed March 5, 1875, and is as follows:

"Section 1. That hereafter in all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintainance of his suit, and shall file copies of the same *as far as they can be obtained*, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant shall plead in the same manner as above required from the plaintiffs.

"Sec. 2. That the defendant *in his answer* shall set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiffs shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial unless the defect for which the exception is taken shall be covered (cured) by amendment.

"Sec. 3. That all objections not specifically pointed out *in*

the manner provided above shall be waived." Acts of 1874–5, p. 229.

In Fogg *vs.* Martin, 53 Ark., 449, the plaintiff had purchased the land at a sale for taxes, and he set out and exhibited no deed, except the one to himself. A demurrer to the complaint was overruled, and this action was sustained by the Supreme Court of the state. The court said that if the necessary facts are stated in a defective, uncertain manner, objection should be taken by a motion to make more specific, Ball *vs.* Fulton Co., 31 Ark., 379; Bushey *vs.* Reynolds, 31 Ark., 657; Henry *vs.* Blackburn, 32 Ark., 449. These cases show that the code has made no change in the substantial allegations necessary to constitute a cause of action, [31 Ark., 379], but that the common law rule, which construes a pleading adversely to the pleader, is abrogated, [31 Ark., 657]; and the court quoted from 16 Wis., 504, "contrary to the common law rule, every reasonable intendment is to be made in favor of the pleading."

In Surginies *vs.* Paddock, 31 Ark., 657, the court, speaking of the statute of 1875, said: "Under the former practice in ejectment, the parties did not produce or disclose their title deeds until offered in evidence on the trial, and surprises not unfrequently occurred by the production of deeds, etc., not anticipated, and which the party against whom they were produced had no opportunity to examine. One of the objects of the statute was to require the plaintiff, on filing his complaint, and the defendant on interposing his answer, to disclose their respective titles, and exhibit copies for mutual examination, to prevent surprises on the trial, etc." In that case, the written instruments of title upon which the plaintiff relied were not exhibited, and the court said: "The entry and issuance of the certificate of purchase are alleged and the loss or destruction of the certificate averred as an excuse for not filing a copy as an exhibit, which was sufficient under the above act of March 5, 1875;" and in Steward *vs.* Scott, 57 Ark., 153, where the

land was claimed by the heirs of one Drennan, under a deed alleged to have been made to their ancestor by Walker, who had entered it in the land office in 1838, the court said, "They aver that Drennan's deed from Walker was recorded in Crawford county where the land is situated; that it has been lost, and that the records have been destroyed by fire; that the certificate of entry, if ever in Drennan's possession, has been lost, etc." It is clear from the language of the statute itself, and the decisions of the courts, that the plaintiff is required simply to set forth and exhibit all deeds and other *written* evidences of title on which he relies, and that, if any part of such written evidence has been lost or destroyed, and, consequently, cannot be obtained, an allegation of that fact has the same effect as if it were produced, without averring what efforts have been made to discover it. He is not required to set out any part of the oral testimony upon which he expects to rely, but only to give his adversary notice of documentary evidence; and his pleading cannot be successfully assailed by a demurrer, on the ground that it does not state the oral testimony which will be introduced to make either the lost documents, or the exhibited documents, admissible on the trial. The deeds or other evidences of title which the act requires the plaintiff to exhibit with his complaint do not constitute any part of the pleadings, and are not evidence, unless introduced and read on the trial. Richardson *vs.* Williams, 37 Ark., 452; Jacks *vs.* Chappin, 34 Ark., 554. A demurrer to the complaint, therefore, does not extend to them, and, if the allegation in the pleading, without the exhibits, are sufficient to show a *prima facie* cause of action, the judgment of the court below was erroreous.

The plaintiff having complied with the statute, by filing the deeds and other written evidences, "as far as they can be obtained," the law provides in the most explicit terms how they shall be assailed by the opposing party. If the deeds or other written evidences are filed by the plaintiff, "the defendant *in his answer* shall set forth exceptions to any of such

documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken;" and "all objections not specifically pointed out *in the manner provided above* shall be waived." If any practical effect is to be given to these plain statutory provisions, the so called exceptions filed on the 5th of November, 1894, could not properly be considered by the court, and its judgment sustaining them was clearly erroneous. Exceptions to the documentary evidence can not be used to support a demurrer, which necessarily admits all the material facts that are well pleaded. When the plaintiff has given notice of and filed, or accounted for, the written evidence upon which he expects to rely on the trial, and has stated "such facts as shall show a *prima facie* title in himself," the defendant can not admit the facts and at the same time dispute the evidence which his adversary proposes to introduce to prove them. If such a practice should be sanctioned, the result would be, that in all actions for the recovery of land, the plaintiff would be summarily driven out of court, without a trial, simply because he had failed to state all his evidence, written and oral, in his complaint. Many of the exceptions in the present case, although tried and decided in connection with a demurrer, are predicated upon a negation of material allegations expressly made in the complaint, and upon palpable misconceptions of the contents of the written documents themselves, and the official certificates attached to them. They were prematurely filed, improperly considered, and erroneously decided, and the very least this court can do is to ignore them entirely, and dispose of the case upon the demurrer alone, according to the well settled rules of law.

In order to simplify the question and avoid, as far as possible, the wide range of discussion indulged in by the counsel for the defendant in error in the court below, and by the court in its opinion, it may be well to state, as succintly as possible, what facts are admitted by the demurrer. They are:

1. The citizenship of the plaintiffs in error, and that they are the only heirs at law of Don Juan Filhiol, deceased.

2. That in the year 1783, their ancestor was appointed by the King of Spain captain in the army and commandant of the militia and assigned to duty at the post of Ouachita, Louisiana (Record, p. 11).

3. That Don Estevan Miro was the governor-general of the province of Louisiana, and that, on the 12th day of December, 1787, the said Filhiol memorialized said governor for a grant of land, upon which a survey of the land applied for was ordered (Record, p. 11).

4. That after that date, and before the 22d day of February, 1788, Don Carlos Trudeau, who was then surveyor general of the province, made a survey of the land applied for and made a report thereof, with a figurative plan and procès verbal in due form, in and by which the land was described as follows: "A tract of land with a front of eighty-four arpents and a depth of forty-two arpents on each side of the stream called 'La Source d'eau Chaude,' about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by lands belonging to the Crown" (Record, p. 11).

5. That "said survey, figurative plan and procès verbal have been lost or destroyed and cannot be produced by plaintiffs" (Record, p. 11).

6. That on February 22, 1788, Don Estevan Miro, as governor of the province, made and delivered to the said Filhiol the paper of that date, which is exhibited, and which is claimed to be a grant of the land described in the complaint; that is, the official execution and delivery of the paper at that date, and its contents, are admitted; but, whether it does or does not, together with the lost survey, plan and procès verbal, constitute a valid grant of the land sued for, or of any land, is a question open to argument on the demurrer (Record, p. 11).

7. That said paper was executed and delivered to Filhiol while he was acting as commandant of the post of Ouachita, and as a reward for civil and military services (Record, p. 11).

8. That Don Estevan Miro, in his capacity as governor-general of the province, was, by the Spanish colonial laws, invested with power to make grants of land and convey the absolute fee simple (Record, pp. 11–12).

9. That after the execution and delivery of the grant, or paper relied on as a grant, to wit, on the 6th day of December, 1788, Carlos Trudeau, who was then land and particular surveyor of the province, made and delivered to Filhiol a certificate, which is exhibited; but the legal effect of that certificate is open to argument on the demurrer (Record, pp. 12–13).

10. That on the 28th day of November, 1803, the said Filhiol sold and conveyed, or passed the title, to the land described to his son-in-law, Narcisso Bourgeat, before Don Vinciente Fejerio (or Fejevio), lieutenant of the regiment of infantry of Louisiana and military and civil commandant of the district and jurisdiction of Ouachita, and witnessed by Senor Baron de Bastrop and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all whom were principal men of Ouachita at that date; that is, it is admitted that this act was done at the time and in the manner stated in the complaint, and that the paper exhibited is genuine; but its meaning and legal effect are open to argument on the demurrer (Record, pp. 13–14).

11. That this deed, or act, was immediately reported to the proper office in the province of Louisiana and was recorded, and that the paper exhibited is a correct copy from that record (Record, p. 14).

12. That on the 17th day of July, 1806, the said Bourgeat reconveyed the said land to Don Juan Filhiol by a deed which was passed before J. Poydras, judge of the Parish of Pointe Coupee, and that this deed was recorded in the office of the Recorder of said Parish on the day of its execution, and that

the paper exhibited is a correct copy from that record (Record, p. 15).

13. That at the time of the execution of said conveyances the Spanish law forbade any public officer, having authority to receive acknowledgements of, or to pass deeds for the conveyance of lands, to pass such deeds or receive acknowledgements thereof, unless he knew that the vendor had title to the land (Record, pp. 15–16).

14. That in the year 1819, Don Juan Filhiol leased said Hot Springs to one Dr. Stephen P. Wilson, for a term of five years, and that Filhiol died in 1821, and his heirs have claimed the title to the land ever since that time (Record, p. 16).

15. That the grant was lost for many years, having, without the knowledge of the plaintiffs in error, been placed in the hands of R. P. Bowie, who died in 1843, and that it was discovered by his widow in 1883, and delivered to one of the plaintiffs in error (Record, p. 16).

16. That the defendant was, at the institution of this action, in possession of a part of the land, the part so possessed being fully described in the complaint, and that it had held the same since March 3, 1892.

The answer filed by the defendant in error, while the demurrer was pending, cannot in any manner affect the questions presented by the demurrer itself; or, in other words, the demurrer must be considered separately from the answer. Greenfield *vs.* Carlton, 30 Ark., 547; Gantts Dig., 4588.

We insist that the admitted allegations of the complaint show, that at the time of the transfer of the province of Louisiana from France to the United States, on the 20th day of December, 1803, in pursuance of the provisions of the treaty between the two counties, concluded on the 30th day of April, 1803, Narcisso Bourgeat had, under the Spanish laws, regulations and customs relating to grants and conveyances of land in said province, a complete and perfect title to the square

league of land including the Hot Springs, and that his title passed to Don Juan Filhiol by the deed dated July 17, 1806. Every essential fact necessary to constitute a valid grant of land under the Spanish laws in force in the province at the time the grant relied on was executed and delivered, is distinctly alleged and admitted, as will be shown by a review of the laws and regulations applicable to the case; and the court must take judicial notice of these laws and regulations, as was decided in United States *vs.* Turner, 52 U. S., 663.

On the 31st day of July, 1786, the King of Spain appointed and commissioned Don Estevan Miro to be "the political and military governor of the city of New Orleans, and the province of Louisiana," conferring upon him all the honors, favors, rights, privileges and immunities, without exception, attached to that office. See 2 White's New Compilation, 444. The regulations then in force were established by Governor O'Rielly, with the royal consent, on the 18th day of February, 1770, and they remained in force, so far as they affected the validity of the grant in this case, until superseded by the regulations of Morales, which were promulgated on the 17th day of July, 1799. The twelfth article of the O'Rielly regulations provided, that—

"All grants shall be made in the name of the king, by the governor-general of the province, who will, at the same time, appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge or notary of the district, and of two adjoining settlers, who shall be present at the survey. The above mentioned four persons shall sign the verbal process which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, and cabildo, another shall be delivered to the governor-general, and the third to the proprietor, to be annexed to the titles of his grant." 2 White's New Recop., 230, 231; 5 Am. State Papers, Lowrie Ed., 289, 290.

It will be observed that this regulation contains no provision requiring the grant, or any papers connected with the grant, to be recorded in any public office or elsewhere; such a requirement was made, for the first time, in the regulations promulgated by Morales in 1799, long after the grant to Filhiol, and, consequently, all that was said on this subject by counsel for the defendant in error, in the court below, and by the court in its opinion, was wholly inapplicable to the case under consideration. In fact, the counsel and the court, in the discussion of this case, have confounded the regulations of O'Rielly with the regulations of Morales and with the laws and regulations of Mexico, in the most bewildering manner, and have attempted to apply, as conclusive of the questions involved, judicial decisions made upon grants issued under laws entirely different from the rules governing this one. Nor do the regulations of O'Rielly require the grantee to be put in actual possession of the land by any formal act, in order to complete his grant, as was erroneously assumed to be the case by the court below. They do not even require the grant to be preceded by a memorial or *requete*, although that seems to have been the customary mode of making an application, and it was the mode adopted in this instance. But the *requete*, not being required by the laws or regulations, if actually made, constitutes no part of the evidence of title and need not be pleaded or preserved, or accounted for.

The governors general of the Spanish provinces possessed very great powers in relation to the disposal of the crown lands, and it is probable that a too liberal exercise of their authority to make grants as rewards for public services and upon other considerations, was one reason why it was taken away from them and conferred upon the general intendant by the royal order of October 22, 1798, and the Morales regulations in 1799. See 2, White's Compilation, 238, 245. Their grants of the public lands appear to have been practically final and conclusive in all cases. White, who was appointed

by President Adams in 1828, at the instance of Attorney-General Wirt, to make a complete translated collection of all the French and Spanish ordinances affecting land titles in the territories ceded to the United States, says in his official report to the Secretary of State, "I sought assiduously, but have been unable to discover a record or notice of the proceedings upon some" [any] "grant or concession which has been made by a captain-general, intendant, or governor, and disapproved of by the king. I have been unable to ascertain whether any such exist." It may reasonably be assumed that, if his researches failed to discover such a case, it was because none such existed, the king having always acquiesced in and respected the grants made by the captains-general, intendants and governors of his provinces, in the Indies.

In Solorzano's *Politica Indiana*, a work of the highest authority on the laws and customs prevailing in the Indies under the dominion of Spain, the powers of viceroys, captains-general and governors are examined and stated with great care, as will be seen from the following extracts:

"Because, as Carolo Pascalio says, and Calisto Ramirez, subjects have no obligation to investigate or know the orders and instructions of a secret nature which are given to the viceroys, in which bounds are put to their power, for, if they do not obey them, they are subject to reprehension or punishment; but what they may perform must be sustained, because they are in quality of factors or substitutes to royalty, for whose actions he who named them is accountable, and put them in that charge which is indeed conformable to right."

Book 3—Chapter 5—Article 31.

"But although this, as I said, proceeds with reference to common law, and it is fit that the viceroys and governors of the Indies never cease to bear it in mind, still, as regards the municipal duty of these, the whole, or almost the whole, is left

to their discretion and prudence; because in the conflict or concurrence of these *cedulas* (royal provisions) and orders *de providende*, they have not to attend so much to the dates and orders of these as to that which may appear for them most convenient to execute: as also, what the merits and services of those who have presented them ask and require, and the state of things in their countries or provinces, the government of which is committed to them."

Book 3—Chapter 9—Article 14.

"This calls us to another question not less frequent and difficult, upon which I have seen some suits adjourned from a discord of opinion—I mean who is to have the preference of two, of whom one obtained by favor from the court a special *encomiẽnda* (Indian tribute) by dispensation made to him by His Majesty; and another obtained the same in the Indies by grant of the viceroys or governors, having there power to do it, without having notice of the other from His Majesty.

"I judge we can examine and easily solve this question as respects the right, only by informing ourselves and looking attentively as to the fact of which of these grants of the same objects preceded the other; for, if we suppose the vacancy to happen in the Indies, and the viceroy or governor, who *there is, as the king himself*, made the appointment lawfully and immediately, and in exercise and use of his faculties, gave the title and possession thereof to some well deserving person, we must come to the resolution that the grant of this same encomienda, which afterwards may be found to be made by the king in his court, is of itself null and of no value or effect, because there is no vacancy to supply, as we said in chapter five, on account of its being previously occupied, and the grant made in proper time; and the concession made in the name of the king, in virtue of authority sufficient and his own commission, must be, and must remain always firm and valid as if himself had made it. Of this we have an express text in speaking

about what is done by the procurators of Cæsar (l. 1. de off. Proc. Cæsar) and others, still more expressive, which decide upon what we are saying upon the subject of gifts."

Book 3—Chapter 10—Article 25.

"And truly, the provinces of the Indies being, as they are, so distant from those of Spain, it became necessary that in these, more than any other, our powerful kings should place these images of their own, who should represent them to the life, and efficaciously, and should maintain in peace and tranquility the new colonists of their colonies, and should keep them in check, and in proper bounds, by such a dignity and authority as the Romans did when they spread theirs over the best part of the globe, dividing the most remote into two kinds, which they called *consular* and *pretorean*—the emperors themselves taking the government of the principal of these in their own hands, and charging the senate with the second; and giving to those who went to govern the first, the name of proconsuls, and to the others that of presidents—about which we have entire chapters in law, where the commulators speak of this more entensively, and an infinity of authors."

Book 5—Chapter 12—Article 4.

"Article 10. From which it happens that, regularly, in the provinces which are entrusted to them, and in every case, and in all things which are not especially excepted, they possess and exercise the same power, authority, and jurisdiction, with the king who names them."

Book 5—Chapter 12.

"The first established rule and sentence is, that viceroys can act and dispatch in the provinces of their government, in cases which have not been especially excepted, all that the prince who named them might or could do if he were himself present, and for this reason and cause his jurisdiction and power must be held and judged more as a thing established than delegated."

Book 5—Chapter 13—Page 376—Article 2.

"Article 4. In particular passages relating to viceroys of the Indies, we have an infinite number of cédulas which decide this and assert the same, which can be seen in the first volume of those in print from page 237, and, besides these another still of a prior date, given at St. Lorenzo, 19th of July, 1614, which orders, generally, 'that the viceroys, as holding the place of the king, can act and decree in the same manner, as the royal person, and must be obeyed as one holding his authority, without replying, without interpretation, under the penalties to which are subjected those who do not obey the royal commands, and such laws as may be imposed by them; and that which they ordain and command, the king will hold as firm and valid.' "

"Article 5. All which is certain, and in such manner that, even when they exceed their powers or secret instructions, they must be obeyed like the king himself, although they may transgress, and are afterwards punished for it, as I have already said in other chapters; and Mastrillo expresses it at some length in speaking of the practice of these secret instructions, and the form which must be observed in them. And the reason of this is, because we must almost (always) presume in favor of the viceroys; and what they do we must consider as done by the king who appointed them, as is said in many texts, and by several authors."

In the case of United States *vs.* Arredondo, 31 U. S., 691, this court said: "The laws of an absolute monarchy are not legislative acts—they are the will and pleasure of the monarch, expressed in various ways; if expressed in any, it is a law; there is no other law making, law repealing power—call it whatever name, a royal order, an ordinance a *cedula*, a decree of council, *or an act of an authorized officer*, if made or promulgated by the king, by his assent or authority, it becomes as to the person or subject matter to which it relates, a law of the kingdom. It is emphatically so in Spain and all its

domains."—page 718. "A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it."—*Ibid.* Speaking of the policy of the United States in relation to the recognition of these grants, as declared by the action of Congress, the court said: "They have adopted as the basis of all their acts, the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested, whether it was property at the time the treaties took effect. The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain, before their right attached."—page 717.

When a grant purports, to have emanated under all the official forms and sanctions of the local government, it must be respected; or, as the court said in the case cited, "That is deemed evidence of their having been issued by lawful, proper and legitimate authority, when unimpeached by proof to the contrary."—page 722. The grant, legally and fully executed, was competent evidence of the matters *set forth in it*, and as none other was necessary, it was in effect conclusive."—page 723. And again, "That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself."—page 729.

In the same case, and on the precise point now under consideration, the court laid down the following rules or principles, which, so far as we are aware, have been adhered to ever since. "A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implications; an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence,

on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury, or chancellor must receive it as evidence *both of the facts it recites and declares, leading to and the foundation of the grant*, and all other facts legally inferrible by either, from what is so apparent on its face."—page 728. "If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid, if there is a discretion conferred, its abuse is a matter between the governor and his government."—*Ibid.* The court cited the case of King *vs.* Picton, Gov. of Trinidad, 30 St. Tr. 869, and then says: "The only questions which can rise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, the power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170–1), legislative (4 Wheat, 423; 2 Pet., 412; 4 *Ibid*, 563), or special (20 Johns., 739; 2 Dow. P. C., 521) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."—page 729. See also Patterson *vs.* Jenks, 28 U. S., 216.

In United States *vs.* Clark, 33 U. S., 436, the land was situated in East Florida, and the grant referred to the royal order of October, 1790, issued by the Captain-General of Cuba, but the court held that it was not issued under that order, but was made in consideration of services. Chief Justice Marshall, who delivered the opinion of the court, examined at considerable length the source and nature of the power of the governors of Spanish provinces in the Indies, to make grants of land in remuneration for public services, and their right to do so at their own discretion was distinctly recognized. Among other things he said: "A grant made by a governor, if authorized to grant lands in his province, is *prima facie* evidence that his power is not exceeded. The connection between the crown and the governor, justifies the presumption that he acts according to his order * * * Such a grant under a general

power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled, by superior authority, would be received as evidence."—page 451. "He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud."—page 452.

In the same case, the chief justice, speaking of the regulations of O'Rielly, which were not abrogated as to East Florida by the Morales ordinances of 1799, said: "This is most clearly the language of a man who supposes himself to possess full power over the subject. The rules he prescribes for himself, do not purport to be limits imposed by a master, but to be marked out by his own discretion, and to be alterable at will. He makes no allusion to orders emanating from his sovereign, marking out the narrow path he is bound to tread; but gives the law himself, in the character of a man invested with full powers."—page 454.

In the case of Strother *vs.* Lucas, 37 U. S., 410, the court discussed the authority of Spanish governors to make grants of land in the provinces, and said: "Where the act is done contrary to the written order of the King, produced at the trial, without explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects."—page 437 This general and comprehensive power belonged, not only to the particular governor who made the regulations, but to his successors as well. In Delassus *vs.* United States, 34 U. S., 117, it was said: "The regulations of Governor O'Rielly were intended for the general government of subordinate officers, and not to

control and limit the power of the person from whose will they emanated. The Baron Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly." See also, Smith *vs.* United States, 29 U. S., 511.

These citations and quotations are made for the purpose of showing:

1. That the Spanish governors in the province of Louisiana were invested with full power and authority to make grants of land within the limits of their jurisdiction, and that, in the execution of this power, they were not absolutely bound by the terms of the regulations made by themselves or their predecessors, and

2. That a public grant of land by one of these officials, not only passed the title, if it purported to pass it, and there was a sufficient description of the land to identify it, but, if not impeached for fraud, is evidence of the facts recited in it "leading to and the foundation of the grant." 31 U. S., 728.

It is too well settled to require discussion, that recitals in a deed or grant are binding on parties and privies. Shelby *vs.* Wright, Willes, 9; Crane *vs.* Morris, 31 U. S., 598; Carver *vs.* Jackson, 29 U. S., 1; Carsens *vs.* Carsens, Willes, 25. While recitals do not generally bind strangers to the deed or grant, or those who claim by title paramount to it, or by title from the same party anterior to the date of the reciting deed or grant, they may be used, even against strangers, as secondary evidence, to prove the contents of a recited paper, which is shown to have existed and to have been lost. 4 Greene (Iowa), 364; Carver *vs.* Jackson, *supra*; Ford *vs.* Gray, 1 Salk., 285. In Glenn *vs.* United States, 54 U. S., 250, the court held that "the petition and the paper signed by Delassus (commandant) must be taken together" and "whatever is stated in either as to facts or intent must be taken as true." In that case, where the concession was made by Delassus, a commandant, acting as

a sub-delegate of the governor, and having no authority to make grants except such as his superior had conferred upon him, the court said that, "taking the facts stated in the memorial and in Delassus' decree thereon to be true (as we are compelled to do) it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan in accordance with the governor-general's instructions;" and, notwithstanding the positive limitations imposed upon the officials by the Mexican law and regulations, this court said in Hornsby *vs.* United States, 77 U. S., 224: "The grant recites that the necessary steps were taken and something more than mere surmises, at this day, are necessary to show that the recital is false."

In United States *vs.* Johnson, 68 U. S., 326, the record failed to show that the required preliminary proceedings had been taken, but the grant recited that "the necessary steps and investigations were previously taken and made in conformity with the requirements of law and regulations," without stating what steps were actually taken, and this court accepted the recital as evidence of a compliance with the laws and regulations.

The United States, having assumed the position and obligations of Spain in reference to all grants made prior to the cession, and having solemnly agreed, by treaty, to protect the rights of property derived from them, cannot be considered strangers to the grant in controversy in this case; and this court knows judicially, from the public laws of the country, that the Hot Springs reservation, in which the land sued for is located, has been surveyed as public land and is held by the United States. The act of April 20, 1832, sets apart four sections of land, including the Hot Springs, as a public reservation, and many other public statutes, have been passed by Congress on the same subject. But, even if this were not sufficient to justify a reliance upon the recitals in this grant as evidence of the facts stated, the character of the grant itself and the public sanction

given to it, if it is a valid grant, by the stipulations of the treaty with Spain, and by the rules of international law, make its recitals binding, not only upon the United States as a government, but upon all their citizens. It is a public grant, made by a public official having general authority to grant lands; if valid, it is recognized and protected by a treaty; its validity can be assailed only by impeaching the authority of the official to make this particular grant, or by alleging and proving fraud, and the latter can not be done on a demurrer. Neither the United States nor any of their citizens can defeat the title claimed under this grant, if it is valid, or question the *prima facie* effect of the recitals contained in it, without establishing, or, at least, alleging, a better title to the same land derived from Spain, or France, or some other government possessing sovereign power over the territory, prior to the date of the cession. According to all authorities, the same rules of evidence apply in the case of a Spanish grant protected by a treaty with this country as in the case of a grant of public lands made by our own authorized public officials, and everybody is bound by the recitals contained in it. If a valid grant was made by Spain before the cession of the territory, it became, by the terms of the treaty, as well as by the rules of international law, to all intents and purposes, the same as a grant made by the United States; because the United States, upon a full consideration, guaranteed it, thereby becoming legally a party to it.

The only question to be determined is, whether the grant in controversy was binding on the King of Spain, according to the laws and usages of that country at the time of the re-cession of Louisiana to France by the secret treaty of St. Ildefonso, October 1st. 1800, and at the time of the treaty of April 30th, 1803, by which the province was ceded by France to the United States; for, if it was binding upon Spain, it is equally binding upon the United States, not only by the law of nations, but by the express provisions of the third article of the treaty with France. Strother *vs* Lucas, 37 U. S., 410; Dent *vs*. Emmeger,

81 U. S., 312; United States *vs.* Percheman, 32 U. S., 51. As was said by this court in United States *vs.* Arredondo, 31 U. S., 691, a title acquired from the former government of a ceded territory, "is as much protected by the laws of a republic as the ordinances of a monarchy."

The grant, as translated and used in the court below, refers to "anterior surveys" made by the surveyor of the province, Don Carlos Trudeau, speaks, in the present-perfect tense, of the "possession given to Don Juan Filhiol," designates him as commandant of the post of Ouachita, states that the tract of one square league of land is situated at about two leagues and a half distance from said river Ouachita, "and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides *expressed* by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve *those surveys*, using the faculty which the king has vested in us, and assign in his royal name unto the said Juan Filhiol the said league of land in order that *he may dispose of the same and of the usufruct thereof as his own*." This is not a mere concession, or order for a survey, in compliance with a memorial or *requete*, such as this court was called upon to consider in many of the cases cited on the other side, but it is an absolute grant *in presenti*, founded on surveys previously made, which were produced, examined and approved. A *requete* was a petition presented by the applicant for a grant, expressed in his own language; it did not purport to emanate from the official having authority to make the grant, but was addressed to him, and, if he acceded to the request, he did not usually make a grant of the lands at once, but made a concession, or grant of the request, and ordered a survey to be made by a designated person, and, when that was made and returned, he executed and delivered the final grant, or a "complete title;" but these words, in the Spanish law, refer only to the instruments or papers which ordinarily constitute the evidence

of title, and not to the estate or interest conveyed by them. De Haro *vs.* United States, 72 U. S., 599; Slidell *vs.* Grandjean, 111 U. S., 416.

According to the admitted allegations of the complaint, all these preliminary steps had been regularly taken before the 22nd day of February, 1788, when the final grant, or complete title, was made in this case. The grant, itself refers to "anterior surveys," and, also, to a "figurative plan," that is, a plan showing the form or figure of the land granted, which it states was made by Trudeau. It is alleged in the complaint and admitted by the demurrer, that Filhiol presented a memorial or *requete* to the governor on the 12th day of December, 1787, for a grant of this tract of land; that a survey of the land was ordered; that after the 22nd day of December, 1787, and before the making of the final grant on the 22nd day of February, 1788, Don Carlos Trudeau, who was then the surveyer-general of the province, made a survey of the land applied for and made a report, with a plan and procès verbal, particularly describing the land as set out in the complaint. Thus, every requirement of the Spanish laws, regulations and customs then in force in relation to the granting of crown lands in the province of Louisiana was strictly complied with. By the survey and description, the land was plainly segregated from the public domain, and the survey gave Filhiol juridical possession according to the Spanish law, without the formality of livery of seizin at common law, or any other act equivalent to it, as will be seen from all the decisions cited.

The grant was not required to be deposited or recorded in any public office, and it comes from the proper custody —the legal heirs of the grantee. There is nothing suspicious about it or about any of the other papers exhibited; but, even if they were claimed to be forgeries, the question could not be tried on demurrer. There was nothing unusual in the proceedings relating to the grant, from the time the petition was presented until the complete title was issued.

First, there was the *requete* accompanied by the usual plan, showing the location of the land applied for; secondly, a concession, with an order for a survey to put the grantee in possession, with a defined boundary; thirdly, the actual survey on the ground; and, fourthly, the approval of the survey by the governor and the execution and delivery of the final grant. See United States *vs.* Castant, 53 U. S , 440.

This was the customary mode of proceeding to secure a title to the public lands in the province of Louisiana, but all these steps were not absolutely necessary, especially in the cases of grants for public services, nor was it necessary that they should be taken in the precise order here stated If a survey had been made on the ground before a *requete* was presented and was approved by the governor and a grant made *in presenti* for the land described in the survey, can it be doubted that a perfect title would pass? On the other hand, if an absolute grant *in presenti* was made in the first instance, without a *requete* or survey, but a survey was ordered and afterwards made on the ground, so as to identify the land, can it be doubted that a perfect title would pass, without the execution of another grant? See United States *vs.* Hughes, 54 U. S., 2; U. S. *vs.* Castant, 53 U. S., 437. The governor, having undisputed power to grant lands, could act whenever he chose and upon any motive or information that was satisfactory to himself, and his grant would be valid if the land was identified and segregated from the public domain, either by a survey, whenever made, or by putting the grantee in possession in some other mode. The grant need not even be in writing, for there was nothing in the civil law of Spain, or in the regulations promulgated in the province of Louisiana, making any difference in this respect between the transfer of real property and the transfer of goods and chattels. See Sanchez *vs.* Gonzales, 11 Mart., 207; Le Blanc *vs.* Martin, 3 La , 47; Landey *vs.* Martin, 13 La., 1.

In United States *vs.* Castant, cited above, the course usually adopted in making grants of the crown lands in the province

of Louisiana was not followed; there was no *requete*, and no survey was ever ordered, except orally, but one was made by Pintado, a deputy surveyor, and, afterwards, Don Carlos Laveau Trudeau, without any order from the governor, except an oral one, made a certificate, stating that he had delivered possession of the land to Donna Maria Manetta Trudeau whereupon the governor "recognizing" the survey and certificate, and "approving them," made the grant; and this court said that "the effect of these proceedings on the part of the Spanish governor was to vest in the grantee a perfect legal estate in the subject granted, the *titulo in forma*." Many other cases, decided by this court, might be cited to show that there was no fixed and unalterable order of proceeding required as a condition to the validity of the grant, but, as it is admitted that all the preliminary steps were, in fact, taken, in the usual and regular order, in the present case, it is unnecessary to extend the argument upon this point.

But it is argued that the paper signed and delivered by Governor Miro on the 22d of February, 1788, was not, in fact, and was not intended to be, a final grant of the land; that the language employed in it shows that a further survey or measurement was required; and that, therefore, if a further survey or measurement was not made, no title vested. The conclusive answer to this is, that it is admitted on the record that when the memorial asking for a grant of this tract of land was presented to Governor Miro by Filhiol on the 12th day of December, 1787, a survey was ordered, and that it was afterwards surveyed by Trudeau, then surveyor-general of the province; that this survey, with a figurative plan and procès verbal, describing the land, was reported; and that on the 22d day of February, 1788, after this survey and report, the governor executed and delivered the grant. This being true, it would require the most unequivocal expression in the grant to satisfy a court that an additional and wholly unnecessary survey was required by the governor.

If the language employed in one part of an instrument is obscure and ambigious and expresses the meaning imperfectly, resort must be had, in the first instance, to other parts of the same instrument, and to the other documents connected with it, and relating to the same subject, and then, if necessary, to extraneous facts and circumstances to ascertain the real intention of the party or parties; and this rule of interpretation, it seems to us, is especially applicable in the case of documents originally written in a foreign language and afterwards translated into ours. Considering the paper in controversy in its entirety, it clearly discloses a purpose to make a final grant of the title *in presenti*, without conditions of any kind, and without any further act upon the part of either the grantor or grantee; for, after speaking of the anterior surveys and certificate made by the official surveyor, Trudeau, of the possession given to Filhiol, and referring to and approving the figurative plan and measurement, it assigns to the grantee, in the name of the king, the league of land, "in order that he may dispose of the same and the usufruct thereof as his own." These granting words are almost precisely the same used in the United States *vs.* Castant, which were "and recognizing the same" (the survey, etc.), "approving them, as we do approve them, etc., we grant in his royal name the lands, etc., that she may use and dispose of them as her own property, in conformity with the aforesaid acts."

It would be an unusual and forced construction of the instrument to hold that, although reciting the past performance of all the acts required by the laws, regulations and usages of the province in such cases, and actually granting the land *in presenti*, in the name of the king, the words "and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters," mean that an additional survey, plan, procès verbal and a further grant were required in order to

vest a perfect title. If such had been the intention, it would undoubtedly have been expressed in direct terms, and a surveyor would have been appointed, or designated, to make the survey and measurement and "fix the bounds," as was plainly required by the regulations of O'Reilly, and by usage, in all cases where a further grant was to be made in order to complete the title. In United States *vs.* Boisdoré, 52 U. S., 62, we have the case of a concession made by the same governor, Miro, with an order of survey directed to the same surveyor, Trudeau, which clearly illustrates the mode of proceeding when a further grant was to be made. The *requete* and concession will be found on pages 64–5, and the order of survey directs Don Carlos Laveau Trudeau to "establish Louis Boisdorè upon the extent of land which he solicits in the preceding memorial, situated in the section of country commonly called Achoucoupoulous, taking as the point from the plantation of Phillip Soucier, a resident of the said section of the country, to the Bayou called the Bayou of the village of Maringonius, with a depth unto Pearl river, it being vacant, and causing no prejudice to the neighboring inhabitants, as well in front as in depth, which proceedings he will reduce to writing, signing with the aforesaid parties, and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form." In Robinson *vs.* Minor, 51 U. S., 627, the petition, or *requete*, asked the governor, Corondolet, "to give order to the surveyor-general of this district to extend the boundaries of the said land, to increase it to contain one thousand arpents," whereupon the governor issued the following order to Carlos Trudeau, the surveyor: "Granted.—The surveyor having to designate the limits in the notes of survey, which shall be exhibited to me, so that a title in a due form may be extended to the party." See also Chouteau *vs.* United States, 34 U. S., 137; Mackey *vs.* United States, 35 U. S., 340; Smith *vs.* United States, 35 U. S., 326; United States *vs.* Porchè, 53 U. S., 427; United States *vs.* Simon, 53

U. S., 433; United States *vs.* Reynes, 50 U. S., 127; La Roche *vs.* Lessee of Jones, 50 U. S., 155; Doe *vs.* Eslava, 50 U. S, 421; Soulard *vs.* United States, 29 U. S., 511; Soulard *vs.* United States, 35 U. S., 100. In many of these cases Miro was the governor who made the orders of survey, and the subsequent grants, and Trudeau made the surveys. Provisions similar to those shown in those cases, or of like import, would have been contained in the grant in the present case if it had been intended to furnish "a corresponding title in due form" after the 22d day of February, 1788.

Unless we are mistaken in the foregoing contention, the only office of the words "and understanding (or knowing '*entendido*') that this land is to be measured so as to include the site or locality known by the name of Hot Waters, etc.," in connection with the statement that it was so "expressed," or set forth in the figurative plan and certificate of Trudeau, was to re-affirm and emphasize the intention of the grantor to invest the grantee with the title to that particular and most valuable part of the land. It was a precautionary, and not an essential or operative, clause in the grant; it directed nothing to be done, nor did it increase or diminish the estate granted, but was simply an additional statement, inserted for the more certain identification of the land described in the plan and certificate, which had been presented to the governor, and to which reference was made in the grant. The words used do not constitute an order or command, and to give them any other force or meaning than we have stated would make them inconsistent with all that precedes and follows them in the same instrument, a result which, according to every sound rule of interpretation, must be avoided if possible.

So far, our discussion of this question has been based on the English version of the grant used in the court below, but the original paper, in the Spanish language, was before that court, and is also here for the inspection and interpretation of this court; and the court will examine it and ascertain for itself

what its true meaning and legal effect are. In L'Fitt *vs.* L'Hatt, 1 P. Williams, 526, the will in controversy was written in the French language, and a translation, which was claimed to be erroneous, was used in the ecclesiastical court. The Master of the Rolls said: "Nothing but the original is part of the petition, neither hath the spiritual court power to make any translation; and supposing the original will was in Latin (as was formerly very usual), and there should happen to be a plain mistake in the translation of the Latin into English, surely the court might determine according to what the translation ought to be. And it was done in this case." See also Denise *vs.* Ruggles, 57 U. S., 242; De Haro, 72 U. S. 599.

At the beginning of the grant in this case the words are, "Vistas las antecedentes diligencias practicadas por el Agrimensor de esta Provincia Don Carlos Trudeau sobre la posecion *que ha dado* al S'or Don Juan Filhiol, Commandante, etc.," and the correct translation is, "Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession *which he has given* (*que ha dado*) to Senor Don Juan Filhiol, commandant, etc." In the translation to which we have referred in the preceding parts of this argument, three Spanish words, "*que ha dado*," are represented by the single word "given," but whether this is really an error of the translator or an omission in transcribing or printing the document, we have no means of knowing. The grant in the case of the United States *vs.* Castant, to which we have so frequently referred, and which was held to vest a perfect title, began with exactly the same language as the one now before the court, "Vistas las antecedentes diligencias practicadas por el Agrimensor de esta provincia Don Carlos Trudeau sobre la posecion *que ha dado* á Da. Maria Manetta Laveau Trudeau, etc.," and it was translated, "Considering the preceding acts had by the surveyor of this province, Don Carlos

Trudeau, in relation to the possession which he has given to Dona Manetta Laveau Trudeau, etc." This is undoubtedly the correct translation of the words "que ha dado," and, consequently, the grant shows that possession had already been given to the grantee, and that it was based upon proceedings which had been completed before it was issued.

In that part of the grant which relates to the inclusion of the Hot Springs in the tract the following words are used : "y demas que expresa el Plano figurativo y certificacion del dicho Agrimensor Trudeau, *que antecede*, etc.," but the words "*que antecede*" ("which precedes"), are not represented at all in the translation used in the court below. They show most clearly that the figurative plan and certificate of Trudeau, upon which the grant was founded, preceded its execution, and, consequently, that no further survey was necessary in order to complete the title. The words last quoted are immediately followed by "*y reconociendo esta reglada al orden del agrimensura*, approvando como approvandos usando de la facultad que el Rey nos tiene concedida, *otorgamos* en su Real nombre al dicho Juan Filhiol, etc." The words we have italicised have been erroneously translated "and recognizing this mode of measurement" and "and assign," whereas they mean "and recognizing the same in conformity to the order of survey," and "we grant," which were the translations made of the same words in the Castant case, and which conform to the usual signification of the language used. We are satisfied that an examination of the original grant will convince the court that the translation used below was imperfect and erroneous in the particulars named and that the true version of the grant shows conclusively that it was intended to vest in the grantee a complete title without any further act by him or by the official authorities.

Upon the record as it stands, this is, perhaps, all that need be said in support of the regularity and validity of the grant,

but, inasmuch as a strenuous effort was made in the court below, and will probably be made here, to prove, notwithstanding the recitals in the grant, and the admissions made by the demurrer, that no actual survey was ever made, it may be proper to submit some suggestions on that particular part of the argument. How the defendant in error can be heard to argue that an admitted fact does not exist, we are at a loss to understand; but, the argument has been made, and we will briefly examine it. First, it is contended that no survey was made by Trudeau after the grant of February 22, 1788, was executed, which, if true, is wholly immaterial; because the only survey required by the regulations and usages of the province was, according to the admitted allegations of the complaint, and the recitals in the grant, made and certified before that date, and was examined and approved by the governor when he finally acted on the application. Next, it is insisted that Trudeau's certificate is not an instrument of evidence, "because it neither purports to be nor is, an official document," and yet the certificate states on its face that he was when he made it, "land and particular surveyor of the province of Louisiana," and the authority cited by counsel, Johnston *vs.* Staines, 2 Ohio, 55, shows, that, if the official character of the person signing the certificate appears in it, "This *prima facie* would be sufficient to authorize the record, and to throw the proof on the person impeaching the deed." But the court knows judicially, not only as a historical fact, but from its own records and judgments in a great number of cases, that Trudeau was the surveyor-general of the province of Louisiana in 1788, and for a long time afterwards, and, even in the absence of these sources of information, it would be bound to assume, until the contrary was shown, that all persons acting in official capacities in the ceded territory were officers *de jure*.

But, according to the view which we have taken of this case, the certificate of Trudeau, although competent evidence of the

facts recited in it, is not an essential part of the evidence exhibited with the complaint, and would not be, even if the demurrer did not admit the anterior surveys. It certifies an act done in the past; it does not purport to be a certificate of a survey or measurement made on the day that it was itself made, and, while it is admissible to corroborate the recitals in the grant, that he, Trudeau, had made the "anterior surveys," it constitutes no necessary part of the title, using that word in the Spanish sense, because the grant itself, with its recitals is sufficient, until impeached by pleading and evidence. He does not certify merely that he had made a figurative plan, as seems to be assumed, but that he had "measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial, situated on the north side of the Ouachita river, at about two leagues and a half distant from said river, to be *verified* by the figurative plan which accompanies," that is, the figurative plan is referred to for the purpose of identifying the tract, which he certifies he had actually measured.

Much of the argument on the other side is predicated upon the assumption that a "figurative" plan and a "conjectural" plan are the same, when, in fact, they are very different things. "Figurative" means "of a definite form or figure," while "conjectural" means "fancied, imagined, guessed at, undetermined, doubtful." The decisions of this court, and the Spanish grants, orders of survey and returns of the surveyors, show that the words "figurative plan" are almost invariably used to indicate the plan made upon an actual survey and measurement of the land. In fact, no other expression is ever used in the Spanish documents, so far as we have been able to discover. The conjectural plan was not made by the official surveyor, or by any other surveyor; it was merely a rough sketch, or diagram, showing in a general way the location of the land applied for, and could be made by the applicant himself. No matter by whom made, it did not, in any case, constitute the basis of a grant.

In the case of United States *vs.* Castant, *supra*, the original record of which we have examined, there was, as already stated, no order of survey made, except orally, to Trudeau, who simply adopted a survey made by a deputy surveyor, and afterwards certified that he "had delivered possession" of the land "corresponding with the figurative *plan or survey;*" and this certificate was admitted in evidence, and the grant was decided to be regular and valid. "I certify having measured," or "having delivered possession," are the forms of words commonly used by the Spanish surveyors, as the court will see by an examination of the numerous cases that have heretofore been presented for its consideration, and it will also be seen that the certificate was not usually contemporaneous with the act certified, but was made some time afterwards.

As was said in United States *vs.* Hanson, 41 U. S., 196:

"There is a wide and marked difference in the effect of the certificate of the surveyor-general and a private individual, who assumes to certify without authority. What the duties of the former are is well known from the proofs in many cases presented to this court" (page 199). * * *

"The duty of confirmation, by the acts of Congress, is deputed to the courts of justice of the United States in execution of the treaty with Spain. It follows, the same evidence, that was accorded to the return of the surveyor-general by the Spanish governor, before the cession, is due to it by the courts of this country. The acts of the officer and the governor were both on behalf of the government; each, by his duty, was bound to protect the public domain, and to guard the law from violation; if the surveyor, therefore, by his plat and certificate, returned that he had surveyed the land at the place granted, not by the assertion only that it was at the place, but by a description in legal form that it was so, then the return was *prima facie* competent evidence, without further proof, on which the governor could found the confirmation. Plats and certificates, because of the official character of the surveyor-

general, have accorded to them the force and character of a deposition: the same as Aguilar's certificate to a copy of the grant; as we held in the case of Wiggins, 14 Peters, 346," pp. 199-201. See also United States *vs.* Low, 41 U. S., 162; Breward *vs.* United States, 41 U. S., 143, in both which it was expressly decided that the official return of the surveyor-general must have accorded to it the force and effect of a deposition.

While the certificate does not contain a full description of the land, by metes and bounds—which were not required in any case to be included in that document—it states, that he had measured the league of land indicated in the memorial and refers for identification, to the figurative plan "which accompanies" and which, with the procès verbal, is alleged in the complaint to have been lost. The certificate is legal evidence of the fact that he had measured the tract "to include the spot known by the name of the Warm Waters," which it was the expressed purpose of the governor to grant, and that he had thereby, according to the rules of the Spanish law, put the grantee in possession of that particular "site or locality." This court said in the Arredondo case, that "possession does not imply occupation or residence, but every man is in the legal seizin and possession of land to which he has a perfect and complete title;" and in Scull *vs.* United States, 98 U. S., 410, and many other cases, it was held, that the legal effect of a survey, under the laws of Spain, was to put the grantee in the instant possession of the land, unless it was at the time occupied by the Indians, in which case he had legal possession, but his right of actual occupancy did not accrue until their title was extinguished.

Our position on the point now under consideration is, that the second certificate of Trudeau was wholly unnecessary as evidence of title or possession, because the surveys, procès verbal and certificate made before the grant was issued, and recited in that instrument, constituted a full compliance with the laws,

regulations and usages in force in the province, and because the grant itself purported to be, and was, a complete divestiture of the title of the crown.

The rules and principles by which this and other courts have tested the validity of grants for land in the territory acquired from Mexico under the treaty of Guadelupe Hidalgo, and by the subsequent purchase, are essentially different in many respects from the rules and principles applicable to grants made in the territory acquired from France by the treaty of 1803, and it is apparent that a failure to observe the distinction between them lies at the foundation of many of the erroneous conclusions reached by the court below in its opinion in this case. In Mexico, the authority of officials to make grants was expressly defined and limited by legislative enactment in 1824 and by positive regulations adopted in 1828, and the officials had no power to make a substantial departure from the requirements of the law and regulations. Unlike the royal governors of the Spanish provinces, they had no general or independent authority to make grants of the public lands, or to alter the manner or form in which they should be executed in order to pass complete titles to the grantees. Every substantial requirement, even in matters of form and procedure, had to be substantially complied with, not only by the grantee, but by the official as well, and a failure so to comply with them vitiated the grant; or, at least, prevented it from passing a perfect legal title, whatever the equities created by it might be. Certain requirements of the law and regulations were very properly held to constitute conditions precedent, and others, conditions subsequent, all which had to be substantially performed, or the title would not vest in the first instance; or, having vested, would be defeated afterwards. But this was not a rule that could be properly applied to grants in the Spanish provinces acquired in 1803, as we have already endeavored to show, and, consequently, very few, if any, of the decisions on Mexican grants have any bearing upon the questions involved in this case. See Fuentes *vs.* United States, 63 U. S., 443.

In Hornsby *vs.* United States, 77 U. S., 224, the proceedings necessary in obtaining grants of land from the government of Mexico under the law of August 18, 1824, and the regulations of November 21, 1828, are stated in considerable detail, and the effect of a failure to comply substantially with all the requirements is considered and decided. The case shows, however, that, notwithstanding the limited authority of the officials, a strict and literal compliance with all the requirements and laws will not be exacted in order to make the grant valid, and that many presumptions arise in favor of the regularity and legality of the proceedings.

The position we have taken as to the finality of the grant in controversy, and its conclusive effect as evidence of title in the grantee, is justified by the subsequent proceedings of the Spanish authorities in Louisiana on the 25th day of November, 1803, when Filhiol made the conveyance, or passed the title, to his son-in-law, Bourgeat. As already stated, the new regulations of Morales were not promulgated until July 17, 1799, more than eleven years after this grant was made, and, consequently, they could not in any manner effect the regularity or validity of the grant itself; but they were applicable to all subsequent private conveyances of land *obtained by concession*, and, therefore, the deed, or act, by which Filhiol conveyed, or passed, the land to Bourgeat, was governed by them. The seventh article of the Morales regulations is as follows:

"To avoid for the future the litigations and confusions of which we have examples every day, we have also judged it very requisite that the notaries of this city and the commandants of posts shall not take any acknowledgment of conveyance of land obtained by concession, unless the seller (grantor) presents and delivers to the buyer the title which he has obtained, and in addition being careful to insert in the deed the metes

and bounds and other descriptions which result from the title, and the *procès verbal* of the survey which ought to accompany it." 2 White's Comp., 236; 5 Am. Stat. Papers, 591.

Thus, the conveyance or act passing the title of land which had been obtained by concession from the crown was made a judicial proceeding before the notary or commandant, as the case might be, and this was done, evidently, from the language of the order, to prevent the confusion resulting from the conveyance of lands to which the "seller" had not acquired the complete legal title by grant. The title—that is, the papers showing the title—had to be presented and delivered to the purchaser in the presence of the official, and the metes and bounds and other descriptions "resulting from the title" and the *procès verbal* were required to be inserted in the deed; and the notaries and commandants were forbidden to sanction the transaction, unless these conditions were complied with. That this was a judicial act having all the force and effect of a judgment or sentence, according to the Spanish civil law, cannot, we think, be doubted. The very object of the ordinance or regulation was to have the validity of the title ascertained and attested by a public officer, who was responsible to the governor and the king for all his official acts; and it must be borne in mind that the separation of the legislative, executive and judicial functions, which constitutes one of the most valuable features of our institutions, was, at that time, wholly unknown to the Spanish system of government. Judicial power might be, and frequently was, conferred upon officials whose ordinary duties were purely executive or ministerial. That this was a judicial act is shown by all the authorities on the subject.

On the 17th day of July, 1803, President Jefferson addressed a letter to Daniel Clarke, enclosing a series of questions concerning the boundaries, population, trade, etc., of the province of Louisiana, and the state of its laws and regulations pertaining to grants of land and other matters, and the answer to these questions, but without date or the name of the author, is given

in 2 White's New Comp., p. 690. For Mr. Jefferson's letter, see Jefferson Manuscripts, Department of State, Vol. 9, Series 1, No. 109. In the answer which, also, is in the Department of State, it is said: "The governor (in his civil capacity) is sole judge of the supreme tribunal of the province. Two alcaldes, hold, each an inferior tribunal in the same place (city of New Orleans) and the commandants of the districts are judicial officers within their jurisdictions." Speaking of the alcaldes or syndics, he said, "they are conservators of the peace, take cognizance of petty complaints, and report the state of his quarter to the commandant. This magistrate (the commandant) keeps the records of his district, and officiates as a notary in passing all sales and bargains, and transfers of real property, which, under this government, are not valid when done between private persons: every document of this nature is in the original matter of record, and the parties are furnished only with copies certified by the commandant (or notary where there is one established) which are received as evidence in courts of justice within the province." 2 White's New Comp., 965–6. White, who was thoroughly versed in the Spanish language, laws, regulations and customs, says in his opinion on the Renaut claim:

"Every sale before a governor or commandant, under the Spanish government, is equivalent to a judicial sentence, and is, in fact, in all respects, the approval of the title of the grantor. The officers before whom a Spanish bill of sale is passed are bound to see that the person making it exhibits his title and that title in the *first sale* is the grant from the proper officer of the crown. The purchaser takes a notarial copy of the bill of sale, which he exhibits to succeeding vendees in the deraignment of title to the last holder. Concessions upon conditions cannot be conveyed until there is proof of the performance of the condition. In the case of Renaut, his grant was absolute; and, by the French laws, that grant was exhibited to the notary as evi-

dence of his right to sell, and it is made the duty of the notary to see that he has a complete *bona fide* title.

"In the tribunals of France and Spain, upon a suit to recover possession of lands, what we would call the plaintiff in ejectment, is only bound to exhibit his notarial bill of sale, which is conclusive without deraignment of his title, under their peculiar system." 1. White's New Comp. App., 719-20.

According to the Spanish law, although all the preceding evidences of title might be lost or destroyed, it would not be necessary even to account for them, or prove their contents, as the judicial sentence of the commandant or notary, unless properly impeached, would be conclusive of the fact that all the necessary proceedings had been taken, and that a complete legal title had been vested by the grant from the crown, giving to the grantee full ownership of and dominion over the property, with a lawful right to sell and convey it. Even in the case of public officers whose functions are not judicial, the legal presumption is that they have not exceeded their powers, or executed them in a defective or erroneous manner, and this rule applies to the acts of foreign as well as domestic officials. After stating the familiar proposition that an official act is *prima facie*, regular and valid, this court said in Stother *vs.* Lucas, *supra*: "The same rule applies to the judicial proceedings of local officers to pass the title to land according to the course and practice of the Spanish law in that province"—page 438. See, also, Murdock *vs.* Gurley, 5 Rob. (La.), 457; 17 La., 220; Choppin *vs.* Michael, 11 Rob., 236, in which the court also said sales of land in parole were valid under the Spanish law. But we deem it unnecessary to multiply authorities in support of this elementary principle of the common and civil law, principle which is absolutely essential to the orderly administration of justice by the courts and the effective execution of the law by executive and ministerial officers.

The regulations of Morales did not require the commandant

or notary to make any certificate, but it was the custom to do so, and in this instance Don Vincente Fernandez Feijeiro certifies that he was military and civil commandant of the district and jurisdiction at the date of the act; that the parties were known to him; that the act was affirmed and witnessed by Baron de Bastrop and others, whose names are given, and that it was done within his jurisdiction. Nor did the regulations require the presence, as witnesses, or otherwise, of persons other than the commandant, or notary and the parties, when the act was done; but if the attestation of the other subscribers added nothing to the authenticity of the deed, it certainly detracted nothing from it. The practice, however, of having these acts or deeds executed in the presence of others besides the commandant, or notary, appears to have been customary, and the extent to which custom and usage entered into and became a part of the law in the Spanish provinces, is shown in several of the decisions heretofore cited.

Although the treaty was made April 30, 1803, formal possession of the territory embraced in it was not delivered to the United States until December 20, 1803, and it is the established rule that the laws of a conquered or ceded country remain in force until actually altered by the new sovereign. Keene *vs.* McDonough, 33 U. S., 308.

It will be observed that the regulations of Morales required the notaries and commandants, when titles were passed before them, to be "careful to insert in the deed the metes and bounds and other descriptions which result from the title, and the procès verbal which ought to accompany it," and a reference to the conveyance from Filhiol to Bourgeat shows that it contains a full description of the land, which must, under the regulations, have been taken from the plan and procès verbal produced before the official at the time. The deed describes "a tract of land with a front of eighty-four arpents and a depth of forty-two arpents on each side of the stream called 'La source d'eau Chaude,' about two leagues distance from its en-

trance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the crown" [Rec. 13]; and the fact that it contains this particular description of the land, which could have been legally procured only from the title and procès verbal, is evidence, if any were required, that the regulations were complied with by the production of the documents before the official when the conveyance was made. It is alleged in the complaint, and admitted, that the lost survey and procès verbal described the land as set forth in this deed.

The commandant had no authority to insert in the conveyance any other description than that found in the title presented by the grantor; and if the conveyance was, under the laws of Spain, a judicial act, as we have endeavored to show it was, the existence of the plan and procès verbal, with a good and sufficient description of the land granted, is conclusively established, so long as the proceeding stands unimpeached. The legal effect of such evidence cannot be avoided by mere inferences or surmises that the description might have been procured from other sources, for, under the law, the official had no right to procure it from any other source, and, until his conduct is successfully impeached, the court is bound to assume that he performed his duty.

If there was, as is alleged and admitted, and as is also shown by the judicial sentence of the Spanish tribunal, an official survey and procès verbal describing the land, and a report or certificate of the surveyor, it was not necessary that such description should be inserted at length in the body of the grant. Under the regulations, the procès verbal was required to be annexed to the grant, and constituted a part of the title. In United States *vs.* Boisdoré, *supra*, the court said that, if the land had been surveyed by Trudeau and he had certified that it was at the place granted, and the survey had been returned, "then such survey would identify the land granted;" and in

Carondelet *vs.* St. Louis, 66 U. S., 179, the court said: "If there be no boundary, the grant is vague and cannot be identified, and the grantee takes nothing. The survey here was the completion of the title, although it succeeded the act of granting the land. It defined the grant." See also Blake *vs.* Doherty, 18 U. S., 359; Magwire *vs.* Tyler, 75 U. S., 650; Cox *vs.* Hart, 145 U. S, 376; Scull *vs.* United States, 98 U. S., 410.

In Buyck *vs.* United States, 40 U. S., 215, the court said: "We apply to the case the laws and ordinances of the government under which the claim originated; and that rule, which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony." United States *vs.* Miranda, 41 U. S., 153; United States *vs.* Lawton, 46 U. S., 10; Villalobos *vs.* United States, 51 U. S., 541; De Vilemont *vs.* United States, 54 U. S., 261; United States *vs.* Clamorgan, 101 U. S., 822. In the present case, the plaintiffs in error do not rely upon extraneous testimony, but upon an official survey and procès verbal, which are alleged to have been regularly made at the proper time, and which constitute a part of their title, but are not actually exhibited because they have been lost.

It appears, therefore, from the admitted allegations of the complaint, from the official recitals in the grant itself, and from the judicial sentence of the commandant on the 25th day of November, 1803, while the Spanish authorities were still in possession and control of the ceded province, that Filhiol held a complete and perfect title to the land in controversy, by the concession or grant from Governor Miro.

The failure to use any word or clause designating a surveyor, or indicating a purpose to execute a further assurance of title, considered in connection with the regulations and practice under them, the absolute terms of the grant itself, its recitals,

and the subsequent judicial sentence by a tribunal, provided for the express purpose of passing upon the validity of titles held by concession, ought to be conclusive of this question. That tribunal had before it the original grant and other papers connected with it, written in a language which it was competent to interpret, and attested by signatures with which it was familiar, and it cannot be presumed, contrary to its unimpeached judgment, that the title was an imperfect one under the laws of the province in which the land was situated.

Don Juan Filhiol was a distinguished and trusted official in the Spanish service, and the land granted to him was situated in his district and jurisdiction, not very remote from the post of Ouachita, at which he was stationed. All that was said about the land being located in the midst of an impenetrable wilderness and occupied by hostile Indians, is foreign to the case, even if true; but there is no evidence of it, and, on the trial of a demurrer, there could be none, except such as is afforded by the authentic history of the country at that period. We know that region of country was occupied by the Quapaw Indians, but they were peaceable, and held the land in subjection to the superior title of the Spanish crown. There is nothing to show that Filhiol and Trudeau and his deputies might not go upon this land without molestation or hindrance, whenever they chose, and, in fact, the latter made many surveys in that part of the country, as will be seen by a reference to numerous decisions of this and other courts. Filhiol was commandant of the district, having many official duties to perform respecting the Indians, and it is not unreasonble to suppose that he was in communication with them, and was at least acquainted with their chief men, and quite familiar with the locality known as the "Hot Waters." It is a well known historical fact, that he made a very full official report on that part of the country to Governor Miro, in 1786, about one year

before his application for this grant. That it was practicable to make an actual survey of this land in 1787 and 1788 would scarcely be open to controversy, even in the absence of allegatiens and admissions that such a survey was, in fact, made.

The Indian occupancy was made the basis of a contention that the grant was void, and this was insisted upon, in opposition to the very authorities cited by counsel for defendant in error in the argument below. The power of the British authorities to make valid grants of land in Florida, subject to the Indian right of occupation, when that country was held by Great Britain, and the power of the Spanish authorities to make similar grants in Louisiana and elsewhere within the jurisdiction of Spain, has been to often asserted by this court, to be questioned or re-argued now. In Mitchell *vs.* United States, 34 U. S., 711, which involved a British grant in Florida, the court said that, "subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislature while the lands remained in possession of the Indians; though possession could not be taken without their consent;" and in Chouteau *vs.* Malony, *supra*, involving a Spanish grant, the power of the governors of provinces to grant public lands "to which a title and instant possession could be given to the grantee" was recognized, but it was held, that in making sales of lands occupied by Indians they were bound by certain laws, usages and customs made for the protection of the Indians, and then it was said that "they" (the grants) "did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it." This rule has been re-affirmed in many cases; and there are none to the contrary, so far as we have been able to discover. See United States *vs.* Fernandez, 35 U. S., 303; Johnson *vs.* McIntosh, 21 U. S., 543, where this question is fully discussed by the court.

The quotation from Marsh *vs.* Brooks, 55 U. S., 513,

relied upon on the other side, had no reference whatever to grants made by the Spanish crown. The court was then discussing a question arising under the treaty between the United States and the Sac and Fox Indians; but the case, involved, also, the validity of a Spanish grant made while the land was occupied by the Indians, and the grant was sustained. The court said that "the county and town of St Louis, the seat of government of Upper Louisiana during the existence of the Spanish colonial government there, the post of New Madrid, the county, town and post of St. Charles were all within the cession made by the Osages; and within which cession lay a great mass of Spanish orders of survey and grants, in regard to which this country has been legislating and adjudicating for nearly fifty years, without any one ever supposing that such concessions were affected by these loose Indian pretensions set up to the country at the time when the concessions were made; pretensions that the Spanish government notoriously disregarded, further than a cautious policy required."

The proposition established by all the decisions upon this question is, that grants made by the Spanish authorities while the land was occupied by the Indians were valid and passed the legal title, but that the grantees took the land subject to the Indian right of occupancy, and, therefore, were not entitled to enter and hold actual possession until that right was extinguished.

One of the many unusual features of the argument in this case is, that the statute of limitations is invoked to sustain a demurrer to a complaint which alleges a wrongful possession of land for only a little more than two years. We admit that, if the plaintiff, in an action for the recovery of real estate, should allege in his complaint that the defendant had been in the continuous possession of the land for a longer period than that prescribed by the statute, holding and claiming it as his own

against the plaintiff and all others, and that he, the plaintiff, was not entitled to the benefit of any saving clause, or other exemption, a demurrer might lie, because the party would have plainly negatived his own right; but there is no such case presented here, and we cannot suppose that one ever will be presented. The application of statutes of limitation does not depend upon the age of the plaintiff's title, but upon the duration and character of the defendant's possession, and it would be a manifest perversion of the law to permit one man to take possession of vacant land belonging to another and hold it against him and his heirs simply because the title of the owner was old.

The only statute relied upon as a bar by counsel, in the argument below, was the act of June 11, 1870 (16 Stat., 149), which authorized any person claiming title to the whole or any part of the four sections known as the Hot Springs reservation, to institute suit against the United States in the Court of Claims, and providing, that, "no such suits shall be brought at any time after the expiration of *ninety days* from the passage of this act, and all claims to any part of such reservation upon which suit shall not be brought under the provisions of this act within that time, shall be forever barred." This was an enabling act, authorizing suits to be brought against the United States, which, otherwise, could not have been maintained, and conferring jurisdiction upon a special tribunal, which, otherwise, could not have heard the cases. It was really intended to provide for the settlement of certain claims of a different character from this, then being urged before Congress, but its provisions were sufficiently comprehensive to embrace this case, as was afterwards decided by the Court of Claims. Filhiol *vs.* United States, 28 Ct. of Claims, 110.

It would be unreasonable in the highest degree to suppose that Congress, even if it had the power, which we deny, intended to confiscate perfect titles to land held by citizens residing more than a thousand miles from the place where the

court was held, simply because they might fail to sue within the short period of ninety days. It is more than probable that the plaintiffs in error never even heard of the act until long after the prescribed time had expired. But the Court of Claims, in the case referred to, gave the act a just and reasonable construction, holding that the bar was upon the jurisdiction of the particular tribunal, and not upon the right of the claimant or title-holder; and this was in accord with the decision of this court in United States *vs.* Percheman, *supra*, where more than a year had been allowed by the act. The provision was, that all claims not filed within the time prescribed were "to be void and of none effect," but Chief Justice Marshall said: "It is impossible to suppose that Congress intended to forfeit real titles not exhibited to the Commissioners within so short a period;" and he held that the only effect of the provision was to prevent the Commissioners from allowing claims not presented within the time.

The court below, however, held that this action was barred, not only by the act of June 11, 1870, relied on by counsel, but, also, by the act of May 26, 1824, providing for the institution of suits to try the validity of claims to land in the State of Missouri and the Territory of Arkansas (4 Stat., 52), which was several times extended, the last extension having been made by the act of June 17, 1844 (5 Stat., 676). If the plaintiffs in error have not a complete legal title to the land in controversy, they cannot recover in this action, no matter whether it is barred by statute or not; if, on the other hand, they have a complete legal title, it is perfectly clear that it is not barred by the statute of 1824, or by the acts passed from time to time continuing that act in force; because this court has always held that they embraced imperfect titles only. In United States *vs.* Castant, *supra*, the judgment of the court below was reversed on the ground that the title was a perfect one, and, therefore, could not be submitted to the court under the law. Magwire *vs.* Tyler, 75 U.

S., 650; United States *vs.* Wiggins, 39 U. S., 334; United States *vs.* Roselius, 56 U. S., 31; United States *vs.* Davenport, 56 U. S., 1; United States *vs.* Reynes, 50 U. S., 127.

Complete titles to land in the territory acquired from France by the treaty of 1803, this court has declared, needed no legislative or judicial confirmation; they were fully protected by the third article of the treaty itself, which is a part of the supreme law of the land, and, until abrogated, is as binding upon the courts as a provision of the Constitution. It is the duty of the United States to protect such titles, and if the lands come into their possession, they are held in trust for the Spanish grantee or his heirs, and a State cannot forfeit them by a limitation law; and, if it should attempt to do so, and the courts of the State should sustain the validity of the act, a case would be presented for the exercise of the appellate jurisdiction of this court, in order that the Constitution of the United States, and a treaty made in pursuance of it, might be vindicated and enforced. In such a case, the question would be directly presented, whether a State of the Union could, by legislative enactment, destroy a right which the United States, by a treaty made in pursuance of the constitution, had agreed to protect. Although the several American States, during the revolutionary war, were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of sovereign and independent governments, this court held in Ware *vs.* Hylton, 3 U. S., 199, that an act of the State of Virginia, passed in 1777, permitting creditors to pay debts due to British subjects into the treasury of the State, and thereby discharge the obligations, was annulled by the provisions of the treaty of peace with Great Britain, concluded in 1783, and that the debts were revived and could be sued for and collected. The act was passed and the treaty was made before the formation of the constitution, but the court gave to the constitution a retroactive effect, and held that the treaty annulled the State law and revived the debts. Upon the principles established in that case, which have never

been disputed, it seems quite clear that no State could forfeit or destroy a title derived from a grant which the United States are bound by treaty to protect, and that, should it be apparent that a State limitation law would have that effect, the courts would be compelled to declare it null and void, so far as it applied to such grants. Treaties can be abrogated or repudiated only by the political department of the government, and, while they remain in force, it is the duty of the judicial tribunals of the United States, when a proper case arises, to see that all the rights secured by them are respected.

Congress can declare when and in what manner, and within what time, suits may be instituted against the United States, because they are not suable at all, except by permission of that body; but it has no power to pass laws prescribing the time within which individuals may bring suits against each other in the State courts, or in the courts of the United States sitting in the States, except by taking away the jurisdiction of such courts after a certain period shall have elapsed, which would, of course, leave the titles of the parties unimpaired. It may declare that no suit shall be maintained in the courts of the United States to recover real estate which has been adversely held for a stated period; or, in other words, it can deprive the party of a remedy in the courts of the United States in such cases, but it cannot bar or destroy the right of the real title-holder, so as to prevent him from suing anywhere else His right would still exist, notwithstanding the legislation of Congress, and might be asserted wherever a tribunal could be found with jurisdiction to enforce it.

If the grant to Filhiol invested him with a valid legal title, the land in controversy became his property, and, at his death, became the property of his heirs at law; and, as such, it was, and now is, protected, not only by the treaty and international law, but by every guarantee in the constitution. The United States, as parties to the treaty, cannot hold it adversely, according to the legal definition of the term, without violating the

obligation imposed by a treaty. If they could take possession of lands legally granted by Spain to an individual and hold them adversely to the real owner, thereby acquiring a title superior to the one they had agreed to protect, or, which is the same thing in effect, thereby defeating a title which they had agreed to protect, the stipulation in the treaty and the rule of international law, which this court has always recognized, would be of no practical value whatever. Such a construction of the rights and obligations of the parties would enable the United States, which cannot be sued except with their own consent, not only to appropriate the very titles they had solemnly agreed to protect, but to take the property of the citizen without his consent and without making compensation, as required by the constitution.

But when and how did the United States acquire such an adverse possession of the land in controversy as would entitle them to rely on a statute of limitation against the perfect title of a Spanish grantee? The Indian title was not extinguished until April 24, 1818, and the grantee had, therefore, no right to enter and occupy the land until that date; and nothing more was done by the United States until April 20, 1832, when a public reservation was provided for, but no actual possession taken. It was not even surveyed until 1838. At what date any one who could have been sued by the plaintiffs in error was actually put in possession of the particular parcel of land in controversy does not appear, but, whenever it was, the person went there as the agent or tenant of the United States, and held possession for them, that is, the United States, by their agents or tenants, have been, and are now, holding the possession of land, which, if the Spanish grant was valid, rightfully belongs to another, whose title they have, by a treaty, guaranteed and agreed to protect. The relations existing between the parties forbid any inference or presumption in favor of an adverse possession; if it exists, or has ever existed, it involves the renunciation of a trust and the violation of a treaty,

and, if it can be established at all in such a case, it must be done by evidence of unequivocal and notorious acts or declarations demonstrating a purpose to exclude the real owner and all others, and to claim the title free from any trust or judiciary obligation of any kind.

This case is clearly distinguishable from Stanley *vs.* Schwalby, 147 U. S., 508, in which the court, though not expressly deciding that the United States could plead a State statute of limitations, held that a public officer in possession of property owned or claimed by the government, when sued in tort, might protect himself by such a plea. In that case, the United States had purchased, paid for and improved the land, without notice of any outstanding title, and had incurred no obligation to protect the rights of the real owner if one should present himself. They held the land in precisely the same manner that individuals ordinarily hold their estates, subject to no trusts or obligations in favor of other claimants; but, notwithstanding these facts, Mr. Justice Field dissented in an opinion to which we beg leave to refer for a citation of authorities and for a definition of adverse possession. Of course, one who confesses that he holds as agent or tenant of another cannot plead adverse possession in himself, because that would be inconsistent with the admitted agency or tenancy; he must rely upon the adverse possession of his principal or lessor, and, if the principal or lessor is, by reason of a trust or a covenant, disabled from disputing the title of the plaintiff in that manner, so is the agent or tenant.

If the plaintiffs in error have failed to show in their pleadings that a valid grant for the land in controversy was made to their ancestor, they have no case; but if they have shown that such a grant was made, we respectfully submit that no statute of limitations can be successfully pleaded against them by either the United States or their agents or tenants, and that, most assuredly, no such statute can be applied by the court on the hearing of a demurrer.

The doctrine of abandonment, which was relied upon in the court below, has no application to perfect titles. Where a party neglects for an unreasonable time to take the necessary steps to complete his title, or fails for an unreasonable time to perform conditions upon which the grant was made, or fails, when reasonable opportunity has been offered, to apply for the confirmation of an incomplete title, it may properly be held that he has abandoned such rights as he originally had; but if he has completed his title, and there are no conditions attached to it, as is the case here, no rule of law or equity will justify a court in declaring that it has been abandoned, unless there has been some element of fraud or deception in his conduct, whereby others have been induced to acquire, in good faith, rights or interests in the property which it would be unjust to disturb.

In a case like this, where no intervening rights are shown, and where the property continues to be held by the original grantor, or by another who has succeeded to the rights and assumed all the obligations of the original grantor, it would be grossly inequitable and unjust to presume an abandonment from mere lapse of time. In every case the question depends upon facts and circumstances which cannot properly be alleged in the complaint and cannot be inquired into on a demurrer. Lapse of time is only one of the facts to be considered, and is not of itself sufficient to defeat a recovery, for, as this court said in Stanley *vs.* Schwalby, *supra*: "In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession or of the abandonment of claims by another, where an action cannot be brought, as the action itself when it can." The history of this grant and the claim under it, when disclosed at a trial on the merits, will show that neither the title nor the right of occupancy, which did not accrue until 1818, has ever been abandoned, but that, on the contrary, they have been repeatedly asserted in memorials to Congress and otherwise, and

denied only because the written evidence of title could not be produced.

A reversal of the judgment below is respectfully asked.

J. G. CARLISLE,
LOGAN CARLISLE,
For Plaintiffs in Error.

No. 341. 59.

Brief of Rose v Rose for D.

Filed April 26, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 341.

MARGARET A. MUSE ET AL., - - Plaintiffs in Error,

v.

ARLINGTON HOTEL COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION.

Brief for Defendant in Error.

U. M. ROSE,
G. B. ROSE,
For Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 341.

MARGARET A. MUSE ET AL., - - *Plaintiffs in Error,*

v.

ARLINGTON HOTEL COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION.

Brief for Defendant in Error.

The statute of Arkansas regulating proceedings in ejectment is copied in our brief on motion to dismiss, which was filed some days ago.

For exceptions to documentary evidence see transcript, p. 8.

For demurrer see id., p. 25.

As the exceptions and the demurrer stand substantially on the same ground, one argument may serve for both.

The pretended survey in this case purports to have been made by Carlos Trudeau. Many forged Spanish claims, purporting to have been indorsed by him, have been before the courts.

U. S. *v.* King, 3 How., 773.

A large number of decrees of confirmations of Spanish claims were rendered in the Superior Court of the Territory of Arkansas. It being suspected that these claims were forged, Congress, on the 8th of May, 1830, passed an act authorizing bills of review to be filed in the cases. The reported case arising on the bills of review is U. S. *v.* Samperyac, Hempst., 143, and this seems to have disposed of sixty-six other cases of forged claims. How many other cases there may have been we know not; the records of the superior court having been destroyed by fire many years ago. The fact of the forgery was clearly established. The court said: "In investigating frauds like these the mind sickens and the feelings revolt." By the time that the case got to this court (Samperyac *v.* U. S., 7 Pet., 222) it was conceded that the grantee in the forged grant, Samperyac, was a fictitious person. In this litigation, one John J. Bowie, ostensible assignee of Samperyac, figured largely. In the case now before the court, the claim is said to have been long in the hands of one Rezin P. Bowie (Tr., 16). The coincidence of names is suggestive. However it is but fair to say that the complaint sets forth that Rezin P. Bowie was "a distinguished lawyer, who made a specialty of Spanish grants;" an allegation which, how-

ever, is not issuable, and which might probably have been made in favor of John P. himself.

Judicial experiences such as these were sufficient to impress on the courts the fact that every document written in the Spanish language did not necessarily import a perfect title to any part of the surface of the earth.

That the papers presented in this case show no title to any tract of land, is, in view of prior decisions of this court, perfectly obvious.

The exceptions to the documentary evidence raised the question of their admissibility just as it would have been raised on a motion to exclude under the old practice. They showed no title in the plaintiffs whatever.

I.

Up to the cession of Louisiana and for years afterward the lands at Hot Springs belonged to the Indians, and were not legally the subject of a grant by the governor of the Territory.

Chouteau *v.* Moloney, 16 How., 239.
Cherokee Nation *v.* Georgia, 5 Pet., 1.
U. S. *v.* Cook, 19 Wall, 591.
Leavenworth R. Co. *v.* U. S , 92 U. S., 742.
U. S. *v.* D'Anterrivo, 10 How., 626.

A Spanish grant of land occupied by Indians was not protected by the treaty of cession "unless the grantee had had open and notorious occupation of the land for

such a length of time as to raise a presumption that the Indians had notice of the claim at the date of the treaty."

March *v.* Brooks, 14 How., 513.

The care exercised by the Spanish government to prevent the irruption of white settlers on the lands of the Indians is shown by the Spanish laws and ordinances touching that matter.

5 Am. State Papers, 226, 231, 232, 234.

The Indian title was extinguished August 24, 1818.

Hot Springs Cases, 92 U. S., 703.

II.

There was no showing that if any survey was ever made it was returned and filed as required by the Twelfth Regulation of the Spanish governor, O'Reilly, made in 1770.

An account of this regulation will be found in U. S. *v.* Moore, 12 How., 217.

The Twelfth Regulation of O'Reilly, as governor of the Province of Louisiana, established February 18, 1770, is as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above mentioned four persons shall sign the *proces verbal*, which shall be made thereof. The surveyor shall make three copies of

the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant."

Copied also in United States *v.* Boisdoré, 11 Howard, 76.

Also in Vol. V, American State Papers, pp. 289, 290.

We see that by this regulation the following essential things were required to be done:

1. At the time of making the concession the governor should appoint a surveyor to fix the bounds of the land.

2. The judge ordinary of the district and two adjoining settlers should be present when the survey was made.

3. These four persons should make out a *proces verbal*, or detailed statement of the survey.

4. The surveyor should make three copies of this survey.

5. One copy the surveyor should deposit in the office of the scrivener (or clerk, or secretary) of the government.

6. He should direct a second copy to the governor general.

7. The third copy he should direct to the claimant or proprietor.

8. The latter should annex his copy to the title paper showing his grant.

No title could vest until a survey was made by the proper authority, nor until the grantee was put in possession of the tract defined by accurate boundaries.

U. S. *v.* Hughes, 13 How., 2.
U. S. *v.* Kingsley, 12 Pet., 476.
U. S. *v.* Wiggins, 14 id., 350.

Unless the document came from the proper archives it was not admissible in evidence.

White *v.* U. S., 1 Wall, 680.
Peralta *v.* U. S., 3 id., 440.

The pretended concession in this case is as follows:

"[*From the land archives.*]"

"The governor intendent of the provinces of Louisiana and Florida west, inspector of troops, etc.

"Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of this post of the Ouachita, of a tract of land of one square league, situated in the district of Arcansas, on the north side of the river Ouachita, at about two leagues and one-half distant from said river Ouachita, *and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters*, as is besides expressed by the figurative plan and certificate of said surveyor, Trudeau, above named, and recognizing this mode of measurement, we approve of this survey, using the faculty which the king has placed in us, and assign in his royal name unto the said

Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

"We give these presents under our own hand, sealed with the seal of our arms, and attested by the undersigned, secretary of his majesty in this government and intendence.

"In New Orleans, on the 22d of February, 1788.

"ESTEVAN MIRO.

"By mandate of his excellence.

"ANDRES LOPE[illegible] ARMESTO."

Without an official survey on the ground no title passed.

Glenn *v.* U. S., 13 How., 250.

Chouteau *v.* Moloney, 16 id., 234.

U. S. *v.* Cambuston, 20 id., 59.

U. S. *v.* Castro, 24 id., 346.

U. S. *v.* Morehead, 1 Black, 227.

U. S. *v.* Castillero, 2 id., 163.

As this document did not come from any official archives it proved nothing.

Peralta *v.* U. S., 3 Wall, 440.

Chouteau *v.* Moloney, 16 How., 234.

U. S. *v.* Castro, 24 id., 346.

U. S. *v.* Teschmaker, 22 id., 405.

U. S. *v.* Pico, id., 406.

U. S. *v.* Power, 11 id., 577.

U. S. *v.* Bolton, 23 id., 341.

Hot Springs Cases, 92 U. S., 713.

The instructions and regulations of Morales, dated July 17, 1799, made the requirements of the regulations of O'Reilly even more stringent and specific.

5 Am. State Papers, 291.

The supposed concession recites certain "anterior surveys;" but this amounts to nothing since "a recital in a grant that prerequisites had been complied with, is not sufficient ground for a presumption that they had been observed."

Fuentes *v.* U. S., 22 How., 443.

They could have been nothing but "chamber" or "conjectural" surveys, mere indications to the surveyor of the spot where the tract was to be surveyed. In 1788 but very few white men had ever been at the Hot Springs, which were then about as inaccessible as the interior of Africa is now.

In Fremont *v.* U. S., 17 How., 554, this court explained how such grants were made, when they were made at all.

"Grants of land in Louisiana and Florida were usually made in the following manner: The party who desired to form a settlement upon any unoccupied land *presented his petition to the officer who had authority to grant*, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied. Upon the receipt of the petition, the governor or other officer who had the power to grant, issued what is called a concession to the party, *authorizing him to have the land surveyed by the official surveyor*

of the province. And it was the duty of this officer to ascertain whether the land asked for was vacant, or the grant of it would prejudice the rights of other parties; and if the surveyor found it to be vacant, and that the grant would not interfere with the rights of others, he returned a plat, or figurative plan, as it was called, and the party thereupon received a grant in absolute ownership.

"These grants were almost uniformly made upon condition of settlement, or some other improvement by which the interest of the colony, it was supposed, would be promoted. *But until the survey was made, no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission, and nothing more.* But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. *But the examination of the surveyor, the actual survey, and the return of the plat, were conditions precedent, and he had no equity against the government, and no just claim to a grant until they were performed;* for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government. There were some cases, indeed, in which there were absolute grants of title with conditions subsequent annexed to them. The case of Arredondo, reported in 6 Pet., and of which we shall

speak hereafter, was one of this description. But the great mass of cases which come before this court, and which have been supposed to bear on this case, were of the character above mentioned."

In U. S. *v.* Vallejo, 1 Black, 451, the court said:

"We add, it is important also that a record should be made of these grants, so that the government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, are not deemed grants until the proper record is made.

"Without this guard, the officers making the grants, as in the present instance, the governor and secretary, would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the government without the means of information on the subject until the grant is produced from the pocket of the grantee."

The concession could have no value as a muniment of title until a survey should be made. "Nor could this be done by conjecture; lines and corners must be established by the finding so as to close the survey."

Denise *v.* Ruggles, 16 How., 243.

Hunnicutt *v.* U. S., 102 U. S., 359.

Delacroix *v.* Chamberlain, 12 Wheat., 601.

Purvis *v.* Harmonson, 4 La. An., 421.

Vilemont *v.* U. S., 13 How., 267.

S. C., Hempstead, 291.

Villalobos *v.* U. S., 10 How., 556.

U. S. *v.* Miranda, 16 Pet., 224.

U. S. *v.* Boisdoré, 11 How., 99.

"A grant delivered out for survey meant, not as with us, a perfect title; but an incipient right, which, when surveyed, required confirmation by the governor."

U. S. *v.* Boisdoré, 11 How., 99.

The manner of making the survey on the ground is particularly pointed out in Ellicott *v.* Pearl, 10 Pet., 441, Winter *v.* U. S., Hempst., 362, and U. S. *v.* Hanson, 16 Pet., 200.

A mere "chamber" survey will not suffice.

U. S. *v.* Lawton, 5 How., 26.

U. S. *v.* Delespine, 9 id., 83.

The thing granted must be so described as to distinguish it from all other things.

U. S. *v.* Delespine, id., 83.

Buyck *v.* U. S., 15 Pet., 225.

The treaty of cession has nothing to do with the case. Without the treaty the law would be the same.

Dent *v.* Emmeyer, 14 Wall, 312.

Unless there is a survey that perfectly identifies the land the concession is ineffectual.

Carondelet *v.* St. Louis, 1 Black, 179.

Whitney *v.* Frisbie, 9 Wall, 192.

Yosemite Valley Cases, 15 id., 87.

Shepley *v.* Cowan, 91 U. S., 238.

A league square of land on the north side of the Ouachita, at *about* two and a half leagues from that river describes nothing. A league square is not necessarily laid out in a square shape. The reference is to contents and not to form. A glance at the map of the land office will show that Spanish grants were very irregular in shape, having no regard even to the cardinal points of the compass.

When the documents were got up for the purposes of this suit it was doubtless thought that there was only one spring at the Hot Springs. Now the court judicially knows that there is a large number of hot springs at some distance apart.

1 Whart. Ev., sec. 339.

Counsel say that the springs shall be taken as a center. Which one?

But why should we take it that the spring, if there had only been one, should be the center of the tract? An argument of that kind was made in Lecompte *v.* U. S., 11 How., 125, and was emphatically rejected.

A grant which under the description given may, with equal propriety, be surveyed with commencement at several different points, is necessarily void.

U. S. *v.* Lawton, 5 How., 10.

Scull *v.* U. S., 98 U. S., 421.

Such a description is bad even after a confirmation by Congress.

Slidell *v.* Grandjean, 111 U. S., 413.
Ledoux *v.* Black, 18 How., 473.
Menard *v.* Massey, 8 id., 293.
Lafayette *v.* Blanc, 3 La. An., 59.
Flaker *v.* Doughty, 15 id., 673.
Arceneaux *v.* Benoit, 21 id., 673.
Snyder *v.* Sickles, 98 U. S., 203.
West *v.* Cochran, 17 id., 403.
Lander *v.* Brant, 10 id., 348.
U. S. *v.* Halleck, 1 Wall, 439.
Scull *v.* U. S., 98 U. S., 419.
Stanford *v.* Taylor, 18 How., 412.

Unless the instrument comes from proper archives there is no presumption of genuineness.

2 Whart. Ev., sec. 1359.
1 Green. Ev., sec. 21.

Until there was a survey made by the surveyor general, and the survey was recorded, there was no investure of title.

U. S. *v.* Lawton, 5 How., 26.

But the title was not good until the survey was confirmed by the governor.

U. S. *v.* Boisdoré, 11 How., 99.

III.

The certificate of Trudeau shows no such survey as was required by law.

As translated by the plaintiffs it reads as follows:

"Don Carlos Trudeau, land and particular surveyor

of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of his excellency, Don Estevan Miro, brigadier of the R. Ex. Gob., intendant of the province of Louisiana, West Florida, etc., dated the 22d of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters; and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of Ouachita River, in the district of Arkansas, at about two leagues and a half distance from said river, to be verified by the figurative plan which accompanies, in conformity with —— of the 6th of the present month of December, and of the current year 1788. (Signed) CARLOS TRUDEAU."

In one respect, though not to our detriment, the translation is plainly wrong. The words: *Don Carlos Trudeau, Agrimensor Real y Particular de la Provincia* de la Luisiana," do not mean "land and particular surveyor;" but they mean "royal and private surveyor."

Suffice it to say that this certificate does not purport to have been made by Trudeau in his official capacity. Hence it is valueless.

Johnson *v.* Staines, 2 Ohio, 55.

Cassele *v.* Cooke, 8 S. & R., 268; 11 Am. Dec., 611.

U. S. *v.* Hansen, 16 Pet., 199.

A certificate of what the surveyor had done without any survey would not be admissible in evidence.

1 Green. Ev., sec. 498.

The whole matter is summed up in Scull *v.* U. S., 98 U. S., 419.

"The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise.

"There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow, and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing de novo. The separation from the public domain must not be a new or conjectural separation, with any element of discretion or uncertainty."

IV.

The claim, if ever valid, is barred by the act of Congress of March 5, 1805.

This 4th section of the act is as follows:

"SEC. 4. And be it further enacted, that every person claiming lands in the above mentioned territories, by virtue of any legal French or Spanish grant, made and completed before the 1st day of October, 1800, and during the time the government which made such grant had the actual possession of the territories, may, and

every person claiming land in the said territories by virtue of the two first sections of this act, or by virtue of any grant or incomplete title bearing date subsequent to the 1st day of October, 1800, shall, before the 1st day of March, 1806, deliver to the register of the land office, or the recorder of land titles, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also on or before that day, deliver to the said register or recorder, for the purpose of being recorded, every grant, order or survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of 12½ cents for every 100 words contained in such written evidence of the claim: **Provided, however,** that where the lands are claimed by virtue of a **complete French or Spanish grant** as aforesaid, it shall not be necessary for the claimant to have **any other evidence of his claim recorded except the original grant or patent, together with the warrant, or order of survey and the plat,** but all other conveyances and deeds shall be deposited with the register or recorder, to be by them laid before the commissioners hereinafter directed to be appointed, when they shall take the claim into consideration. And if such person shall neglect to deliver such notice in writing of his claim, together with a plat as

aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred: nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, *which shall not be recorded as above directed*, ever after be considered or admitted as evidence in any court of the United States, against any grant derived from the United States."

The time for filing the evidence of the grants was extended in 1806, 1807 and 1811; but the time granted by the last extension has long since expired.

V.

The claim is barred by the act of Congress known as the Hot Springs Act.

Under the provisions of the act of June 11, 1870 (16 Stat., 149), all persons claiming title, either legal or equitable, "to the whole or any part of the four sections of land constituting what is known as the Hot Springs Reservation, in Hot Spring County, in the State of Arkansas," had an opportunity to institute suit, in the nature of a bill in equity, against the United States in the Court of Claims, "and prosecute to final decision any suit that may be necessary to settle the same; *provided*, that no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall be not brought under the provision of this act within that time shall be forever barred."

It seems to be plain that when the Hot Springs Reservation Act of 1832 was passed the plaintiffs "had no vested interest in the land which a court of justice could recognize. Then the United States government was the legal owner, and had the power to reserve it from sale."

Hale *v.* Gaines, 22 How., 161.

VI.

The claim is barred under the act of Congress of May 26, 1824.

This is an act entitled "An act enabling claimants to lands within the limits of the State of Missouri and the Territory of Arkansas to institute proceedings to try the validity of their claims" (4 Stats., 52). It provided for the adjustment of all claims arising out of Spanish and French grants by petitions to be filed by the claimants in the district courts of the United States. The fifth section is as follows:

Sec. 5. And be it further enacted, That any claim to lands, tenements or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and (in) equity, and no other action, at common law, or

proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claims."

The laws prevailing in Louisiana before the cession "must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other State."

U. S. *v.* Turner, 11 How., 668.

The plaintiffs contend that they are not barred by either this act or the act of 1805, because they say that as their claim was a perfect one it was not within the purview of either. It is not necessary to discuss that question; since, if this title is a perfect one, there could not be such a thing as an imperfect one; and the act of Congress was a nullity.

VII.

After such a great lapse of time it must be presumed that the claim, if it ever had any validity, was long ago abandoned.

Pontalba *v.* Copland, 3 La. An., 87.

Gonsolin *v.* Brashear, 8 Martin, 35.

Fuentes *v.* U. S., 22 How., 460.

U. S. *v.* Moore, 12 id., 222.

U. S. *v.* Repentigny, 5 Wall, 211.

U. S. *v.* Hughes, 13 How., 3.

Valliere *v.* U. S., Hempst., 338.

People *v.* Clark, 10 Barb., 120.

It is of course impossible now to prove the signature of Miro or of Trudeau, or to disprove them.

VIII.

The claim is barred by the State statute of limitations.

This for the recovery of lands is seven years.

Ark. Dig. St., 1894, sec. 4815.

Usually the defense of the statute of limitations cannot be interposed by demurrer in cases at law; but where the complaint shows that a sufficient time has elapsed to bar the cause of action, and also the non-existence of any ground of avoidance, a demurrer will lie.

Collins *v.* Mack, 31 Ark., 684.

Dowell *v.* Tucker, 46 id., 452.

There is a saving in favor of infants, married women and insane persons; but such disabilities do not last forever.

Respectfully,

U. M. Rose,

G. B. Rose,

For Defendant in Error.

MUSE *v.* ARLINGTON HOTEL COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 59. Argued October 26, 27, 1897. — Decided December 6, 1897.

A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision.

The same rule being applicable in respect of the validity or construction of a treaty, some right, title, privilege or immunity, dependent on the treaty, must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted.

In respect of the plaintiff's case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution, or the validity or construction of the treaty, and this court is without jurisdiction to review the action of that court.

MOTION to dismiss or affirm.

Margaret A. Muse and others filed their original complaint in ejectment against the Arlington Hotel Company, July 25, 1894, in the Circuit Court of the United States for the Eastern District of Arkansas, to which defendant demurred. Pending the demurrer, plaintiffs filed an amended complaint, in which they averred that defendant was "a corporation organized

under the laws of the State of Arkansas and doing business at the city of Hot Springs in that State"; and that plaintiffs, except "Alice F. South, who is a citizen and resident of Coahuila, Mexico," were all citizens and residents of the United States, some of Louisiana, some of Texas, some of Mississippi, and one of Illinois.

That they are the only heirs at law of Don Juan Filhiol, who died intestate, a citizen of Louisiana, in 1821; and that they are the owners in fee simple of a league of land described in the complaint.

Plaintiffs alleged that Filhiol was born in France in 1740; that he left that country in 1763, going to San Domingo, and thence to Philadelphia in 1779, and finally arrived in New Orleans in May of that year, where he joined the volunteers in the war between Spain and England; that in 1783 he was appointed by the King of Spain captain of the army and commandant of the militia and assigned to duty at the post of Ouachita in Louisiana, under instructions from Don Estevan Miro, the governor general of that province.

That, on December 12, 1787, Filhiol memorialized the governor of Louisiana and West Florida for a grant of land, whereon the governor ordered a survey of the land applied for, and that before February 22, 1788, Don Carlos Trudeau, the then surveyor general of Louisiana, made a survey in accordance with the law as it then existed, and made a report thereof, with figurative plan, and procès verbal in due form, in and by which the land was described; that the survey, figurative plan and procès verbal have been lost or destroyed, and plaintiffs could not produce them, but they alleged that on February 22, 1788, Miro, as governor, made and delivered to Filhiol a grant for a certain league of land, the description of which was set forth in the complaint; that the grant was made while Filhiol was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his position as commandant; and that Miro, as governor, was by the Spanish colonial laws vested with power to make grants of land and to convey by such grants the absolute fee simple to the lands granted.

Statement of the Case.

Plaintiffs further averred that the land granted by Miro to Filhiol consisted of a certain one square league with the hot springs at the city of Hot Springs as its centre, the description, metes and bounds of which league were more accurately described in the survey, figurative plan and procès verbal; and, setting forth a translation of the grant, plaintiffs stated that after the delivery of the grant to Filhiol, December 6, 1788, Trudeau, who was then public and private surveyor of Louisiana, made and delivered to Filhiol a certificate of measurement of the land, a translation of which was also given; that the making and delivery of this certificate was a delivery of the judicial possession of the land, and had the force and effect of segregating it from the public domain, and that the grant vested full and complete title in the grantee.

It was further alleged that Filhiol sold and conveyed the land, November 25, 1803, to his son in law, Bourgeat, passing the deed before the military and civil commandant of Ouachita, the deed being witnessed by two witnesses, who signed the act in the presence of two others, and a copy of which was set out; that the deed was immediately reported to the proper office of Louisiana and was afterwards duly recorded; that Bourgeat retroceded the same lands to Filhiol by deed passed before the judge of the parish of Pointe Coupee, July 17, 1806; that this deed (a copy of which was given) was duly filed and recorded; and that Filhiol never thereafter parted with his title to the land. And plaintiffs alleged that when these deeds were made, the Spanish colonial law forbade any public officer having authority to receive acknowledgments and pass deeds for the conveyance of lands, to pass such deeds or receive acknowledgments thereof, unless they knew that the vendor had title to the lands proposed to be sold.

Plaintiffs also averred that in 1819, Filhiol leased the Hot Springs to one Dr. Wilson for five years; that shortly thereafter, in 1821, Filhiol died; and that ever since his death, plaintiffs had always urged their title to the property, and employed agents and attorneys to do so for them, and that during a large part of this time they had been embarrassed by the want of the original grant, which had been mislaid;

that often and repeated searches were made by plaintiffs for it but without success, but that lately, in 1883, the grant had been found.

The complaint continued: "Said plaintiffs state that they claim title to said league of land so granted by said Estevan Miro, as governor of said province, to the said Juan Filhiol, as the heirs at law of said Juan Filhiol, and they state that they will rely upon the following written evidences of their title for the maintenance of this action:

"First. On the grant made by Don Estevan Miro, as governor of the province of Louisiana, on February 22d, 1788, to Don Juan Filhiol, a translation of which grant is filed herewith, marked 'Exhibit A,' and made part hereof.

"Second. On the certificate of measurement or survey made by Carlos Trudeau, surveyor of the province of Louisiana, on December 6, 1788, and delivered by him on that date to Don Juan Filhiol, a translation of which, marked 'Exhibit B,' is filed herewith and made part hereof.

"Third. On the deed of said land made by Don Juan Filhiol to Narcisso Bourgeat on November 25, 1803, a translation of which is herewith filed, marked 'Exhibit C,' and made part hereof.

"Fourth. On the deed or retrocession of said land made by Narcisso Bourgeat to Don Juan Filhiol on the 17th of July, 1806, a translation of which deed of retrocession is herewith filed, marked 'Exhibit D,' and made part hereof.

"Fifth. On the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803.

"Sixth. On the Fifth Amendment to the Constitution of the United States."

And plaintiffs then alleged that defendant was in the unlawful possession of part of the land, "which portion is included in the Hot Springs Mountain reservation, in the city of Hot Springs, county of Garland, State of Arkansas, the boundary lines of which reservation were established by the Hot Springs Commission by public surveys in pursuance of the laws of the United States;" and this was followed by a

particular description of the land so alleged to be unlawfully possessed.

Plaintiffs charged that defendant had been in such unlawful possession since the third day of March, 1892, during all of which time plaintiffs had title to and the right of possession of said land; and alleged that by reason of such wrongful possession they had been damaged in the sum of twenty thousand dollars; and prayed judgment for possession and damages. To this amended complaint defendant demurred, and also filed an answer and exceptions.

The Circuit Court sustained the demurrer and exceptions, and entered judgment dismissing the complaint with costs, whereupon this writ of error was sued out directly to that court.

The Circuit Court, Williams, J., held, 68 Fed. Rep. 637, that the alleged granting papers were ineffectual to perfect title, because there was no showing that the acts required by law to be performed, to wit, the making of an actual survey on the ground; the certification and approval of the same; and the delivery of possession, had ever been performed; that the claim was barred under the act of Congress of May 26, 1824, c. 173, 4 Stat. 52, entitled an act "enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," and by the act of Congress known as the Hot Springs Act of June 11, 1870, c. 126, 16 Stat. 149; that the claim, if originally valid, must be considered as having been abandoned; and that plaintiffs were estopped from claiming title to the land under the facts disclosed.

Mr. John G. Carlisle for plaintiffs in error. *Mr. Logan Carlisle* was on his brief.

Mr. G. B. Rose for defendant in error. *Mr. U. M. Rose* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Writs of error may be sued out directly from this court to the Circuit Courts in cases, among others, in which the construction or application of the Constitution of the United States is involved; or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891, c. 517, § 5, 26 Stat. 826. If this case does not fall within one or both of these classes, this writ of error cannot be maintained.

As ruled in *Ansbro* v. *United States*, 159 U. S. 695, 697, "a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision." *Green* v. *Cornell*, 163 U. S. 75, 78.

The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted. *Borgmeyer* v. *Idler*, 159 U. S. 408.

The general doctrine has been frequently announced in cases involving the jurisdiction of this court under the twenty-fifth section of the Judiciary Act of September 24, 1789; section 709 of the Revised Statutes; and acts relating to the revision of judgments of the Supreme Court and Court of Appeals of the District of Columbia and the Supreme Courts of the Territories, as well as in cases involving the jurisdiction of the Circuit Courts. *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, and cases cited; *United States* v. *Lynch*, 137 U. S. 280; *South Carolina* v. *Seymour*, 153 U. S. 353; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Linford* v. *Ellison*, 155 U. S. 503; *Durham* v. *Seymour*, 161 U. S. 235; *Hanford* v. *Davies*, 163 U. S. 273; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648.

The amended complaint stated that plaintiffs would "rely

upon the following written evidences of their title for the maintenance of this action," and enumerated, among them, "the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803," 8 Stat. 200; and "the Fifth Amendment to the Constitution of the United States;" but nowhere was any right, title, privilege or immunity asserted to be derived from either Constitution or treaty. There was nothing to indicate in what way, if any, the cause of action was claimed to arise from either.

The Fifth Amendment prohibits the deprivation of property without due process of law, and the taking of private property for public use without compensation. The treaty of cession, Public Treaties, 332, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. But neither amendment nor treaty gave what was not already possessed.

The jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and not on the ground that the case arose "under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority." Act of August 13, 1888, c. 866, § 1; 25 Stat. 433. And it is settled that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

If this case had been taken to the Circuit Court of Appeals, the decision of that court would have been final under the sixth section of the statute, and it might well be concluded that therefore the writ of error would not lie under the fifth section.

In respect of plaintiffs' case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution or the validity or construction of the treaty.

The ground, among other grounds, in defeat of plaintiffs' action, that the claim was barred by the act of June 11, 1870,

was indeed sustained, but that was as matter of construction, and the constitutionality of the act if held to apply to the claim, rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the Circuit Court was invoked upon it. In this court it was contended for plaintiffs in error that the act was an enabling act authorizing suits to be brought against the United States, which otherwise could not have been maintained; that the limitation operated on the jurisdiction and not on the right; and that to bar title if suit were not brought within ninety days was so unreasonable that the intention to do so could not be imputed to Congress. These forcible suggestions would undoubtedly have been accorded due weight by the Circuit Court of Appeals, but we are unable to deal with them on this writ.

The Circuit Court also held that plaintiffs' title failed because of non-compliance with the Spanish law. It was not pretended that the treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the Circuit Court to determine into what category the alleged grant fell. In doing so, the construction of the treaty was not drawn in question in any manner.

Writ of error dismissed.

Mr. Justice Harlan and Mr. Justice White dissented.